

1572

# R E P O R T S

*of Hargrave*  
OF

## C A S E S,

UPON

Appeals and Writs of Error,

IN THE

High Court of Parliament;

From the Year 1701, to the Year 1779.

WITH

TABLES, NOTES and REFERENCES.

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BY JOSIAH BROWN, Esq.

BARRISTER AT LAW.

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VOLUME THE FOURTH.

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REFLECTS

UPON

OF THE

APPREHENSION OF THE

IN THE

REPRESENTATION



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# T A B L E

O F T H E

## N A M E S of the C A S E S

I N T H E

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## A TABLE of the NAMES of the CASES.

[illegible]







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# C A S E S

HEARD and DETERMINED

IN THE

## High Court of Parliament.

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*Samuel Mason, Esq;* - - Appellant. Case 1.

*Moses Hawkins and William Dawes, Exe-  
cutors of Moses Hawkins, deceased,  
Mary Dawes, Executrix of George  
Dawes, Senior, deceased, and Others,* } Respondents.

4th March, 1729. \*

**J**OH*N Hawkins* of *London*, citizen and distiller, had an only child named *Sarah*, who married the appellant, and with whom her father, on that occasion, gave a considerable fortune. Mosely's  
Rep. 20.

On the 2d of *June*, 1720, *Mr. Hawkins* made his will, whereby, after taking notice, that having fully advanced his said daughter, by giving her a plentiful fortune, his personal estate was wholly at his own disposal; he gave to *Moses Hawkins*, his brother, 100*l.* of his capital stock in the *South Sea* com-

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\* This case ought, in point of time, to have appeared in the third volume of these reports, but was accidentally omitted.



## Cases in Parliament.

1729.

pany, to be transferred to him within six months after the testator's death; and to his sister the respondent *Mary Dawes*, a like legacy, and transferrable at the same time; and after her death his will was, that the said stock so given to her should be divided to her children then living. He then gave to trustees, for his said daughter *Sarah*, 1000*l.* *South Sea* stock, to be at her disposal, and desired the appellant to comply with the disposition which she should make thereof; and he gave the appellant 500*l.* and 10*l.* for mourning. He also devised to the appellant and his heirs for ever, two houses in *Wapping*; and after giving several other legacies, he gave and bequeathed the rest and residue of his estate real and personal, to his said daughter *Sarah* during her natural life; and after her decease, he gave and bequeathed the same to her child and children born of her body for ever, in case such child or children should attain the age of 18, or be married; but in case they died before such age or marriage, then he gave and bequeathed the said rest and residue of his estate as follows, viz. to the said *Moses Hawkins* his brother, and to his heirs for ever, all his messuages or tenements in *Houndsditch* and *Woolpack-alley* in the parish of *St. Botolph without Aldgate, London*; and to his kinsman *Moses Hawkins* and his heirs, the lease of his houses in the *Minories*; and appointed his daughter the said *Sarah Mason* executrix of his will, during her natural life, and from and after her decease, he made and appointed his brother the said *Moses Hawkins*, and his brother-in-law *George Dawes*, late husband of the respondent *Mary Dawes*, executors; and made his stock in the *South Sea* company liable to the payment of his debts, and of such of his legacies as should be due within six months after his decease.

On the 24th of *March*, 1720, the testator died; after whose death, the said *Sarah Mason*, his daughter, proved his will, and she and her husband, the appellant, possessed themselves of the whole of his personal estate.

On the 26th of *April*, 1722, the appellant's wife died without issue; and thereupon *Moses Hawkins*, the testator's brother, and the said *George Dawes* proved the will, and the appellant obtained letters of administration of the personal estate of his wife.



## Cases in Parliament.

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After the testator's death, and before the two several legacies of 100*l.* *South Sea* stock were transferred to the said *Moses Hawkins* and *Mary Dawes*, 33*l.* 6*s.* 8*d.* and 6*l.* 5*s.* 0*d.* *South Sea* stock were added to each 100*l.* capital stock.

1729.

After the expiration of the six months next ensuing the testator's death, the said *Moses Hawkins*, in his own right, and the said *George Dawes* for the respondent *Mary* his wife, applied to the appellant and his late wife for the said legacies; but the appellant put off transferring or making them any satisfaction for the same till after his wife's death, and on the 30th of *May*, 1722, fourteen months after the testator's decease, and not before, he transferred to the said *Moses Hawkins*, deceased, and the respondent *Mary Dawes* respectively, 100*l.* capital *South Sea* stock only, and paid each of them one half year's dividend only in respect thereof; and thereupon *Hawkins* and *Dawes* severally executed to him a release and discharge of all the legacies given the said *Moses Hawkins* and the respondent *Mary Dawes* by the testator's will, and of all dividends payable for the same; they not being then apprized that the said additional stock of 33*l.* 6*s.* 8*d.* and 6*l.* 5*s.* 0*d.* had been made to every 100*l.* capital *South Sea* stock, or of the dividends that were then due in respect of such capital and additional stocks; but as soon as they discovered the same, they applied to the appellant to transfer to them the said additional stocks, and to pay them respectively the dividends due in respect thereof; but which he refused to do, insisting, that they were not entitled thereto; or if they were, yet, that the releases so executed as aforesaid, were a sufficient bar against such claims.

Whereupon the said *Moses Hawkins*, and the respondents *Mary Dawes*, *Elizabeth Deek*, then *Elizabeth Dawes*, and *William Dawes*, together with the said *George Dawes*, sen. and *George Dawes*, jun. his son since deceased, and the respondent *Cuthbert Smith* and *Sarah* his wife, since also deceased, did, in *Trinity* term, 1723, exhibit their bill in the high court of Chancery against the appellant; setting forth, that the respondents *Elizabeth Deek* and *William Dawes*, and the said *George Dawes*, jun. and *Sarah Smith* were the children of the said *George Dawes*, sen. and the respondent *Mary* his wife, and were, after the decease of the said *Mary*, entitled to the 100*l.*

*South*



1729.

*South Sea* stock given to her as aforesaid, and to the additional stocks added thereto; and therefore the bill prayed a transfer thereof accordingly, and to have an account of the testator's personal estate, and that the residue thereof, not disposed of by his will, might be paid to the said *Moses Hawkins* and *George Dawes*, sen. as executors of the testator's will, after the death of the appellant's wife.

To this bill the appellant put in a plea and answer, and by his plea insisted on the releases which had been given him by the said *Moses Hawkins* and *George Dawes*, sen. on transferring the said two several legacies of 100*l.* *South Sea* capital stock. But this plea, upon argument on the 11th of *March*, 1723, was over-ruled.

After this, *George Dawes*, sen. died, having made his will, and thereof appointed the respondent *Mary Dawes* sole executrix; and *George Dawes*, jun. being also dead, the respondent *Mury*, his mother, took out letters of administration to him, and the suit being thereby, and by the intermarriage of the respondents *Darius Deek* and *Elizabeth* his wife, abated, the same was afterwards duly revived.

On the 12th of *June*, 1727, the cause was heard before the Master of the Rolls in the absence of the Lord Chancellor; when his Honour declared, as to the 100*l.* *South Sea* stock devised to the said *Moses Hawkins* deceased, and the 100*l.* *South Sea* stock devised to the respondent *Mary Dawes*, that they were respectively entitled thereto, and to the additional stock thereon, and the proceeds thereof, from the end of six months after the death of the testator *John Hawkins*; and therefore ordered, that the additional stock on the said 100*l.* and 100*l.* *South Sea* stock, should be transferred to the said *Moses Hawkins* deceased and the respondent *Mary Dawes*; and that the Master should take an account of the dividends received on the said 100*l.* and 100*l.* *South Sea* stock, and the additional stock thereon; and that the appellant should answer and pay the same to the said *Moses Hawkins* deceased and the respondent *Mary Dawes* respectively; and the respondent *Mary Dawes* was to enjoy the 100*l.* *South Sea* stock, and the additional stock thereon, during her life; but she was to declare the trusts thereof



thereof in the manner mentioned in the decree: And his Honour further declared, that by giving a legacy to one of the executors, neither of the executors were excluded; and therefore decreed, that the appellant should account before the Master, for the personal estate of the testator *John Hawkins*, which had come to the hands, custody, or power of the appellant, or the said *Sarah* his late wife, or any other person in trust for them or either of them; and the usual directions were given for taking of the said account; and the surplus of the testator's estate, after payment of his debts and legacies, and the appellant's and respondents costs of the suit to that time, which were to be taxed by the Master, was to be divided into moieties; and that the said *Moses Hawkins* deceased was to have one moiety thereof, and the respondent *Mary Dawes*, the executrix of the said *George Dawes* senior, the other executor of the said testator *John Hawkins*, was to have the other moiety; and the consideration of costs, from the time of the decree, was reserved till after the accounts thereby directed were taken, and the Master should have made his report.

The appellant conceiving himself aggrieved by the latter part of this decree, appealed from it; insisting, that if the whole and entire right to the residue of the testator's personal estate, was not well bequeathed to and vested in his late wife; yet, that the testator having expressly given away no more of the residue after her decease, than some leasehold houses to his kinsman *Moses Hawkins*, the surplus was still undisposed of by the will, and ought, according to the statute for the distribution of intestate's estates, to go to the appellant's wife as the testator's only next of kin, and consequently must now belong to the appellant as her administrator. That it did not appear to have been the testator's intention to give the surplus to *Hawkins* and *Dawes*, barely by making them executors after his daughter *Sarah's* death; especially, as they had each of them legacies in the will; viz. 500*l.* *South Sea* stock, and 10*l.* for mourning to *Hawkins*, and *Dawes's* share of the 40*l.* given to his wife to buy mourning for him and herself and two children. And therefore it was hoped, that so much of the decree as directed the appellant to account for the surplus of the testator's personal estate, would be reversed.

P. Yorke.  
C. Talbot.



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T. Lutwyche.  
J. Willes.

In support of the decree it was contended, that *Sarah Mason* dying without issue, the appellant, as her administrator, could not be entitled to this residue, because the same was only given to *Sarah* for her life. And that there being no devise of the residue after the death of *Sarah*, the same became vested in *Hawkins* and *Dawes*, they being made executors after her death, and thereby entitled to the residue of the personal estate not disposed of by the will. The only objection which had been, or could be made was, that there being a legacy given to *Hawkins*, he and *Dawes* ought not to take such residue as executors; and it was compared to the case, where a legacy is given to an executor, and nothing said about the residue of the testator's estate. It was also insisted to have been several times decreed, that the executor shall be only deemed a trustee for the testator's next of kin; but it was admitted, that where no legacy is given to an executor, and there is no devise of the residue, there the executor shall be entitled to such residue in his own proper right as executor, without being deemed a trustee for the next of kin. In the present case there were two executors, and there was no legacy given to one of them; so that it could not from the words of the will, be inferred to have been the testator's intention, to make his executors trustees only of the residue of his personal estate. And though there have been a variety of opinions, and some different determinations touching the point of the residue of personal estates, not expressly bequeathed by will, yet it has never been carried so far, as to exclude two executors by reason of a legacy given only to one of them: And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE  
affirmed,  
Jour. vol. 23.  
p. 496.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Thomas



Case 2.

*Thomas Frederick*, Esq; eldest Son of  
*Sir Thomas Frederick*, Knt. deceased,  
 who was the second Son of *Thomas*  
*Frederick*, Esq; deceased, - } Appellant.

*Sir John Frederick*, Bart. eldest Son and  
 Heir of the said *Thomas Frederick*, and  
 sole Executor of *Leonora* his Widow,  
 Dame *Mary Frederick*, Widow and  
 Executrix of the said *Sir Thomas Fre-*  
*derick* deceased, *Thomas Powell*, Esq;  
 and *Mary* his Wife, *Rumney Diggle*,  
 Esq; and *Leonora* his Wife, *James*  
 Duke of *Atbol*, and *Jane* his Wife,  
 which said *Mary*, *Leonora*, and *Jane*, } Respondents.  
 were the three daughters of the said  
*Thomas Frederick*, deceased, *William*  
*Peere Williams*, and *John Borrett*,  
 Esqs; surviving Executors of the said  
*Thomas Frederick*, deceased, and *John*  
*Frederick* and *Charles Frederick*, the  
 younger Sons of *Sir Thomas Frederick*,  
 and Grandsons of the said *Thomas*  
*Frederick*. - - - }

5th May, 1731.

IN 1674, a treaty was had for a marriage between the said  
*Thomas Frederick*, who was the only son and heir of *Sir*  
*John Frederick*, Knt. citizen and alderman of *London*, and  
*Leonora Marescoe*, an orphan of the city of *London*, and one of  
 the three daughters and coheirs of *Charles Marescoe*, merchant,  
 deceased, then of the age of 15; part of her fortune, viz.  
 8300*l.* was then in the chamber of *London*; other part thereof  
 was in the hands of her mother, as executrix of her father;  
 and she was likewise entitled unto a third of two thirds of her  
 father's

1 Wms. 710.  
 Viner, vol.  
 15. p. 279.  
 ca. 4.  
 Strange 455.



1731.

father's real estate, in possession; and to a third of the other third in reversion after her mother's death, which estate was 384*l.* *per ann.* The fortune which Mr. *Frederick* afterwards acknowledged to have had with her, amounted to 25,000*l.*

By lease and release, dated the 19th and 20th of *January*, 1674, made between Sir *John Frederick* and Dame *Mary* his wife, and the said *Thomas Frederick* his son, of the first part; *Leonora Marescoe*, the mother, and the said *Leonora* the orphan, of the second part; Sir *Nathaniel Herne* and *Joseph Herne*, and Sir *John Letbieulier* and *Christopher Letbieulier*, of the third part; in consideration of the intended marriage, and of the said 8300*l.* and taking notice also, that *Leonora* the daughter was intitled to one third part of her father's real estate as aforesaid; Sir *John* and *Thomas* his son conveyed divers messuages in *London* to trustees and their heirs, upon trust as to several of them, of the value of 332*l.* *per ann.* to the use of the said *Thomas Frederick* for life, without impeachment of waste; remainder to trustees to preserve contingent uses; remainder to *Leonora* the daughter, during her life for her jointure, and in bar of dower; remainder to their first and other sons in tail male; remainder to trustees for 100 years; remainder to the heirs of the body of the said *Thomas Frederick*; remainder to the right heirs of Sir *John*: As to other part of the premises, to the use of Sir *John* for life; remainder to Dame *Mary* his wife for life; remainder to the said *Thomas Frederick* for life; remainder to trustees for 1000 years; remainder to the heirs of the body of the said *Thomas Frederick*; remainder to the right heirs of Sir *John*: And as to the residue, to the use of Sir *John* for life; remainder to the said *Thomas Frederick* and the heirs male of his body; remainder to the right heirs of Sir *John*.

By another indenture of the same date, and between the same parties, Sir *John* covenanted to pay upon the day of marriage to the trustees 11,500*l.*; and it was declared, that the 8300*l.* in the chamber of *London*, should, immediately after the marriage, be also paid to the trustees; and that out of the 11,500*l.* they should pay the said *Thomas Frederick* 5000*l.* to his own use; and that the remaining 6500*l.* together with all such sums of money, for the part and share of the said *Leonora* of her father's personal estate, as should come to the hands of the said trustees,



trustees, should be laid out in a purchase of lands, to be settled to the use of the said *Thomas Frederick* for life, without impeachment of waste; remainder to trustees to preserve contingent uses; remainder to the said *Leonora* for life; remainder to their first and other sons in tail male; remainder to the trustees for 500 years; remainder to the heirs of the body of the said *Thomas Frederick*; remainder to the right heirs of Sir *John*. And the trusts of the said several terms of years, were declared to be to raise portions for daughters, if no son.

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These settlements being made without any previous application to the Court of Aldermen, were considered by all parties only in the nature of proposals, to be laid before that court for their consideration; it being well known to the parties, who were all citizens and freemen, that by immemorial custom, the sole care and disposal of the persons and portions of all orphans in marriage, was vested in the Court of Aldermen, and that it was absolutely necessary to lay the settlements before them, to have their consent and approbation to the terms of the marriage; for that no licence could be had either for the marriage, or for receiving the portion of the orphan, without their previous approbation; that court being a court of record, and having immemorially exercised this kind of jurisdiction, and punished any person who married an orphan without their consent, by fine, imprisonment and otherwise.—All parties therefore applied to the court, and laid the settlements before them, for their allowance or disallowance; and a special court having considered the same, and all the circumstances both of the orphan and the said *Thomas Frederick*, made the following orders, viz.

“ 15th February, 1674, at this court, licence is granted to  
 “ *Maresco*, one of the daughters and orphans of  
 “ *Maresco*, late citizen and of *London*, deceased, to marry  
 “ with *Thomas Frederick*, Esq; son and heir apparent of Sir  
 “ *John Frederick*, Knt. and Alderman; provided that Mr.  
 “ Common Serjeant do approve of the settlement made upon  
 “ the said orphan, and signify the same unto this court. And  
 “ the said Sir *John Frederick* did thereupon promise and engage,  
 “ that if the said settlement intended should not prove satis-  
 “ factory to Mr. Common Serjeant and to this court, that then



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“ he would make up and enlarge the same, to the full satisfaction of this court. And the said Mr. Frederick, being thereunto required by this court, did promise and engage, and the said Sir John did also undertake, in his behalf, to take his freedom of this city within one year now next ensuing.”

“ And it is agreed by this court, that for the future, when any persons, not free of this city, shall address themselves to this court for licence to marry any orphan of this city, that they be first required and urged by this court to take their freedom of this city, before this court give consent to such marriage.”

“ Upon the humble desire of *Thomas Frederick*, the son of Sir John Frederick, Knt. and Alderman, and citizen and grocer, being capable of his freedom of this city by patrimony in the company of but desiring to be

admitted into the freedom of this city in the company of  
It is ordered by this court, that the said *Thomas Frederick* shall be admitted into the freedom of this city by redemption, in the said company of paying to Mr. Chamberlain for the city's use, 3s. 4d.

On the 20th of *February*, 1674, the marriage was had, and the 11,500*l.* was paid to the trustees, who paid to the son 5,000*l.* The 8,300*l.* was also soon after received out of the Chamber of London, which, together with the 6,500*l.* the remaining part of the 11,500*l.* was put out at interest; so that all that was stipulated for on the orphan's part was performed, and every thing was compleated, except what was to be done on the part of the said *Thomas Frederick*.

On the 14th of *November*, 1676, an order was made by the Court of Aldermen, reciting, that the said *Thomas Frederick* had not taken his freedom of the city, notwithstanding the engagements he had made in that court for that purpose; and directing, that he should be warned to appear before that court on *Thursday* then next. And he still neglecting to pay any regard to that summons, or to take up his freedom, the following order was made, viz.

“ 15th



## Cases in Parliament.

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“15th March, 1680, upon some debate now had in this  
 “court touching Mr. Frederick, who married one of the orphans  
 “of *Marescoe*, deceased, not having taken his freedom  
 “of this city, according to his promise made unto this court at  
 “the time he had licence to marry her, whereby she, if she  
 “survive him, will not be entitled to the third of his personal  
 “estate, in like manner as the widows of freemen are. It is  
 “by this court referred to Mr. Recorder and Mr. Common  
 “Serjeant, to peruse and consider of the settlement made upon  
 “the said orphan, as also the marriage agreement, and see if  
 “the same be made according to the direction and intent of this  
 “court, and the said Mr. Frederick's promise; and to certify to  
 “this court how they find the same, and their opinions there-  
 “in.”

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It is observable, that Sir *John Frederick* the father presided in this court as *locum tenens*, and pronounced this order to enforce the performance of his son's promise, and his own undertaking.

But notwithstanding these several orders, it does not appear that the said *Thomas Frederick* paid any obedience to them, by taking up his freedom, or ever made any objection thereto before the court; but he soon got all the money which was in the trustees hands into his own, except 3,000*l.* and never laid out any part of it in purchases.

Mr. *Frederick* afterwards treated his wife and children with great unkindness and severity, altho' they constantly behaved themselves towards him with the utmost duty and submission. At last he shewed such a settled aversion to them, and his behaviour was such, that their lives were rendered so uncomfortable, that they could no longer live with him.

A separation was therefore, in 1714, agreed upon, and articles for that purpose executed; whereby he allowed his wife only 300*l.* per ann. and her daughters 50*l.* per ann. a-piece. And among several other extraordinary clauses in these articles, he obliged them, that, without his consent in writing, they should not come to any place, or make any visit to any person within 300 yards of his habitation, upon pain of forfeiting out of their allowance 40*s.* a-piece for every such visit.

His



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His usage towards his eldest son the respondent Sir *John*, was equally severe; for he was at least 25 years of his life, even to his father's death, banished the family without the least misbehaviour or undutifulness on his part. And in the year 1684, Mr. *Frederick* levied a fine, and barred the entail created by the settlement of *January* 1674, in all the estates therein comprised, except those which were settled on *Leonora* in jointure.

Mr. *Frederick*, having acquired a very great personal estate, made his will, dated the 20th of *May*, 1718, and thereby gave to his wife 10*l.* over and above her jointure, and to his eldest son Sir *John* 1,000*l.* over and above what was settled upon him by his marriage agreement; to his son Sir *Thomas* 1,000*l.* to his daughters *Mary*, *Leonora* and *Jane*, 1,000*l.* a-piece; but these legacies to his eldest son and daughters were given upon this express condition, that they should not contest his will with his executors or other his legatees, and that the said legacies should not be paid them, but upon their respective releasing all manner of right, claim and demand whatsoever, in law or equity to his real or personal estate. After giving several other legacies, he devised to his executors and trustees the residue of his personal estate, in trust thereout to pay themselves 500*l.* a-piece, and a maintenance for the appellant till his age of 22, and then to assign, transfer and deliver the remainder to him; but if he died before that age, then all the estate and premises given to him, were to be equally divided between the respondents *John* and *Charles*, the testator's younger sons; and as to his houses and real estate, whereof he had barred the entail as aforesaid, and which were of the yearly value of 1,250*l.* he devised the same to his second son Sir *Thomas* and the heirs male of his body, with remainder to his own right heirs.

On the 21st of *May*, 1720, the testator died; and on the 8th of *July* following, *Leonora*, his widow, brought her bill in Chancery to carry into execution, and to have the benefit of all the agreements made upon her marriage; and particularly, the engagements of her late husband and his father, so solemnly entered into with the Court of Aldermen before her marriage, and that she and her children might have two thirds of her husband's personal estate, in conformity to the custom of the city,



city, and for an account of such personal estate, and to have the trust money in his hands laid out in purchases.

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The appellant also brought his bill, to have the benefit of his father's will, and that proper directions might be given for carrying the same into execution.

On the 30th of *March*, 1721, both causes were heard before the Lord Chancellor *Macclesfield*; who, having taken time to consider thereof, made his decree on the 25th of *August* following; and thereby declared, that he was of opinion, that the testator was bound by the agreement made before his marriage with *Leonora*, and that his taking up his freedom of the city of *London* was part of such agreement; and that as he was bound, so his executors and all persons claiming under his will, ought likewise to be bound by the said agreement, and that the same ought to be performed according to the true intent and meaning thereof, so as that the widow and her children might have the benefit and fruit of it; and that therefore, the will ought to be deemed and taken to be void as to two thirds of his personal estate, and the same ought to go and be distributed, as if he had actually taken up his freedom in his life-time; and his Lordship did order and decree the same accordingly: And in order thereto, decreed an account to be taken of the personal estate, with the usual directions for taking the same. And, after directing the real estate devised to Sir *Thomas Frederick*, to be disincumbered out of the personal estate; and so much of the trust money agreed by the marriage settlement to be invested in lands, as came to the hands of the said *Thomas Frederick*, to be raised out of his personal estate and invested accordingly, and the rest of his debts to be paid; it was decreed, that the residue of such personal estate, consisting chiefly in stocks in divers companies, and in bonds and annuities from the Government, and other securities, should be divided in specie in thirds; (except the bank stock and parliamentary lotteries subscribed into the bank, which were specifically devised to the executors, in trust in the first place for payment of 9,000*l.* legacies, and as to the remainder thereof, in trust for the benefit of the testator's two younger grandsons, which said bank stock and lotteries, or the produce of the said lotteries arising on the subscription made of the same into the *South Sea* company, were to be valued by the Master, and



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a price to be set upon the same, at the time of the division of the said estate; and instead of the specific division thereof, the Master was to allow to the widow and her children, the value or amount of two thirds thereof, out of the residue of the testator's testamentary part of his personal estate,) and when the personal estate should be so divided as aforesaid, it was decreed, that one third part thereof should be paid, transferred or delivered by the executors and receivers to *Leonora*, the testator's widow; and that one other third should be divided into five parts, equally between the testator's five children, and be accordingly paid, transferred or delivered to them respectively; and that the other third should go and be disposed of, as near as it could, according to the testator's will: And it was referred to the Master to settle the proportions thereof between the defendants, the testator's three grandsons. But as to the money legacies given to the testator's five children, *John*, *Thomas*, *Mary*, *Leonora* and *Jane*, his Lordship declared, that they could not have the benefit of the agreement, and likewise of the will; and they then electing to have the benefit of the agreement, and not to take the money legacies by the will, it was therefore ordered, that the said money legacies to them devised, and also the money legacy devised to *Sir Thomas Frederick* by the will, should sink into the testamentary part of the testator's estate.

Pursuant to this decree, the Master made his report on the 20th of *December*, 1722, and thereby certified that he had taken an account of the testator's personal estate, and divided the same into thirds. This report was made with the unanimous consent of all parties interested, who were then of age, and signed by them; and was absolutely confirmed by consent as to them, and against the infants and executors, according to the course of the court: And accordingly, the shares of the personal estate belonging to the widow and her five children, were paid and assigned to them by the executors and trustees, and what was belonging to the appellant and his two brothers, was reserved for them until they came of age.

On the 2d of *August*, 1723, the Master made another report, certifying, that the widow and her five children had acknow-



ledged before him, that they had received their several shares : And this report was signed in like manner as the former.

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All parties interested, who were of age, being in the full possession and quiet enjoyment of what was thus assigned to them; a treaty of marriage was, in *January*, 1725, had between the respondents *Rumney Diggle* and *Leonora* his wife, one of the testator's daughters : And previous to the marriage an agreement was made, to which *Sir Thomas* was a party, whereby all the portion of the respondent *Leonora*, which consisted of the particulars of her share of her father's personal estate allotted to her by the decree and report, was assigned to trustees for the benefit of them and their issue.

A settlement was also made by *James Lannoy*, Esq; of his estate of about 600*l. per ann.* upon the respondent the Dutchess and her issue, in consideration of the increase of her fortune; and six several long annuities of 50*l. per ann.* each, part of her share of the testator's personal estate, allotted to her by the report, were assigned to *Sir Thomas Frederick* and another trustee, in trust for the Dutchess for life; remainder to *Leonora* her daughter for life; remainder to Mr. *Lannoy*.

Soon afterwards Mr. *Lannoy* died, having made his will, and thereof appointed the Dutchess residuary devisee and sole executrix : And pursuant to a decree of the court of Chancery founded upon this will, in consideration of 1450*l.* paid to the Dutchess, the reversion of the said six annuities was assigned by *Sir Thomas Frederick*, to *James Colebrook* and *James Ruck*.

By several deeds-poll, *Leonora* the testator's widow, assigned 1666*l.* 13*s.* 4*d.* *per ann.* in long annuities, part of her share of the testator's personal estate, to the respondent *Sir John*, for his own use.

*Sir John*, previous to his marriage with Mrs. *Kinnerfley*, in consideration of her portion, assigned 1000*l. per ann.* of these long annuities to trustees, upon trust to sell and invest the same in a purchase of lands, to be settled upon his Lady, and the issue of that marriage.

Previous



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Previous to the marriage of the respondent *Thomas Powell* with the respondent *Mary* his wife, his real estate, in consideration of her portion, which consisted of the particulars of her share of her father's personal estate, allotted to her by the report, was conveyed to Mr. Justice *Price* and Sir *Thomas Frederick*, upon trust, for securing 700*l.* *per ann.* rent-charge for her jointure; and then the said real estate, together with her portion, was settled for the benefit of the said *Thomas Powell* and his wife, and their issue.

On the 26th of *October*, 1729, the appellant attained the age of 22, and being desirous to have his share of his grandfather's personal estate, allotted to him by the report of the 20th of *December*, 1722, paid and transferred to him; Sir *Thomas* his father applied to *Leonora* the widow, and to the respondents Mrs. *Powell* and Mrs. *Diggle*, and desired them to consent to a motion to be made by the appellant to have his share assigned to him; and at the same time Sir *Thomas* assured them, that the appellant wholly acquiesced in the decree made by Lord *Macclesfield*, and that nothing was or should be attempted by the appellant, any ways to vary or alter the same; and thereupon they readily consented thereto, and Sir *Thomas* then sent the following letter to the respondent Sir *John*; viz.

“ Dear Brother,

“ Having prepared a petition to the court of Chancery, that  
 “ Messieurs *Peere Williams*, Mr. *Borret* and *Chapman*, should  
 “ transfer and make over to my son *Thomas Frederick*, what  
 “ was decreed him by the court of Chancery as the testamentary  
 “ part of my deceased father's estate; he wholly acquiescing to  
 “ what my Lord Chancellor *Macclesfield* has done: I acquainted  
 “ my mother therewith, and my sisters; upon our applying  
 “ to the present Lord Chancellor's secretary, Mr. *Woodford*, to  
 “ have it presented, he acquainted us, that my Lord had made  
 “ a resolution to hear no more petitions till the 12th of *March*  
 “ next, and that he was further resolved not to hear any in  
 “ private, has occasioned me to proceed by way of motion,  
 “ and which must be done on *Thursday* next, the last day of  
 “ the term, that my son should not lose so much time; this  
 “ I had not notice could be done till two o'clock this day:

And



“ And since I have been with my mother, to acquaint her with  
 “ the nature of the thing; the motion is, that the family  
 “ shew cause, as soon as conveniently they can, why he should  
 “ not be put in possession of the following sums, decreed by  
 “ my Lord *Macclesfield* as his part of his grandfather's estate,  
 “ *East India* stock, in the name of *Thomas Frederick*, Esq;  
 “ deceased, 6200*l.* *Million Bank*, D<sup>o</sup> 666*l.* 13*s.* 4*d.* *South*  
 “ *Sea* stock, D<sup>o</sup>. 13,003*l.* 4*s.* 9*d.* orphan fund, D<sup>o</sup>. 1111*l.*  
 “ 3*s.* 11*d.* long annuities 1675*l.* per ann. This you'll per-  
 “ ceive is only matter of form, and none of you shall be put  
 “ to any charge, and I believe will be readily consenting to,  
 “ it no way breaking into any thing that has been done by the  
 “ decree on your behalf. Mr. *Jodrell*, I have desired my  
 “ mother to appear on your side, and I shall take care he be  
 “ fee'd for the same; and I have desired brother *Diggle* to  
 “ appear on my part as guardian, and Mr. *Lepostre's* as receiver,  
 “ and Mr. *Mead* on my son's; so that you'll see we take all  
 “ the charge upon us; and there is nothing done, or shall be  
 “ done in prejudice to the decree; and is only to get my son  
 “ into possession of what was decreed him: Wherefore, I  
 “ would not have you hurry yourself to town, unless it be  
 “ your own inclination; being,

“ Dear Sir, your affectionate brother and humble servant,

“ *Thomas Frederick.*

“ *Gerrard-Street, Jan. 10, 1729—30.*”

This letter, tho' dated the 10th of *January*, 1729, was really written on the 10th of *February*, and received by the respondent Sir *John* on the 11th of *February*; who immediately came to town, and upon discourse with his mother and sisters, and communicating the said letter to them, they all agreed to consent to the motion.

Accordingly, on the 13th of *February*, 1729, the motion was made; and upon hearing the decree, the Master's report of the 20th of *December*, 1722, and the testator's will read, and counsel for the widow, the respondent Sir *John* her eldest son, and her three daughters, consenting thereto; and counsel for Sir *Thomas* and his two younger sons, and for the executors *Williams*, *Borret* and *Chapman* not opposing the same: It was



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ordered, that the executors should forthwith transfer to the appellant, his executors, administrators and assigns, the said 6200*l.* *East India* stock, 666*l.* 13*s.* 4*d.* *Million Bank* stock, 1111*l.* 3*s.* 11*d.* orphan's fund, and 1675*l.* *per ann.* long annuities at the *Exchequer*, contained in the Master's report; and also 6907*l.* 19*s.* 5*d.* *South Sea* stock, and 6907*l.* 19*s.* 4*d.* *South Sea* annuities, being the produce of the 13,003*l.* 4*s.* 9*d.* *South Sea* stock, in the report mentioned to belong to the appellant: And therein the executors were thereby indemnified.

T. Lutwyche.  
N. Fazaker-  
ley.

But notwithstanding this order, the appellant thought proper to appeal from the decree; insisting, that it ought not to be considered as any part of the testator's marriage agreement, that he should be made free of the city of *London*; and it was apprehended, that if the entries in the books of the court of Aldermen were to be taken as evidence concerning the terms of the marriage, yet there was not any thing therein from whence it could be inferred, that the court of Aldermen would not consent to the marriage, unless the testator had consented to take up his freedom of the city. On the contrary, the licence was granted to Mrs. *Marescoe* to be married to Mr. *Frederick*, provided the Common Serjeant approved of the settlement made upon her, and signified such approbation to the court; and what follows in the entry, seems plainly to import, that Mr. *Frederick's* taking up his freedom of the city of *London*, was no part of the condition on which the licence was granted, but a thing merely collateral, and might be proposed by the court of Aldermen out of regard to the interest of the city, in order to increase the number of rich freemen, who might be proper to serve in the chargeable offices of the city. That this appeared the more probable, from the words of the order immediately following; *viz.* "that *for the future*, when any persons not free, shall address " for leave to marry an orphan, they shall be first required " and urged (but it does not say *obliged*) to take their free- " doms, before the court gives consent to such marriage." That there was no instance given, wherein this latter order was pursued; but on the contrary, several instances were proved in the cause, where non-freemen applied and had licences to marry orphans, without being required or urged to take their freedoms; — particularly, this *Leonora's* own sister *Jane Marescoe*,



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*Marescoe*, had licence on the 17th of *June*, 1679, to marry *John Leukner*, Esq; a non-freeman, upon a settlement made to the satisfaction of a committee and the Recorder, or Common Serjeant, and they were married accordingly; and Mr. *Leukner* was never urged or required to take up his freedom. That if the testator's taking up his freedom, had been intended to be part of the marriage agreement, the court would have obliged him to do it immediately; or made that, as well as the settlement, a part of the condition of the licence; and not have given him a year's time to do what might have been done in a day: For if he had died within the year, it could not have been pretended, that he had broken his promise, nor could his widow have had any benefit by it. That the testator was married on the 23d of *February*, which was eight days after the licence, and in a few days afterwards, the fortune was paid out of the chamber of *London*; and though it did not appear, that the Common Serjeant made any report about the settlement, yet it must be presumed that he was satisfied with it, and acquainted the court that it was adequate to *Leonora's* fortune; because if it had been otherwise, the fortune would not have been paid out of the chamber. That it appeared by the settlement, that Mrs. *Frederick's* friends took care to have an ample provision made for her, even beyond her fortune at that time. — Her money in the chamber of *London* was about 8300*l.* and she was entitled as one of her father's coheirs, to about 90*l.* *per ann.* in possession, and to the reversion of about 43*l.* *per ann.* more after her mother's death. — The estate settled by Sir *John Frederick* for her jointure, was then 330*l.* *per ann.* and afterwards increased to about 590*l.* *per ann.* and by the marriage agreement, there was 14,100*l.* including her own 8300*l.* to be laid out in a purchase of lands, for a further settlement on her and her issue male. So that her eldest son, the respondent Sir *John Frederick*, enjoyed above 1300*l.* *per ann.* under the marriage settlement and agreement, which was not affected by the testator's will, or the decree now in question. Great stress is however laid upon the additional fortune which came to Mrs. *Frederick* after her marriage, which is alledged to have been very large; but this was entirely unknown and unexpected at the time of the marriage, and was many years afterwards recovered by the testator in a suit against her mother, and amounted, above the charges,

to



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to no more than 3480*l.* and all that he received besides, was 100*l. per ann.* including taxes, out of the real estate which fell to her by the death of her mother and sister, about sixteen years before his death. So that the provision made for her upon the marriage, appeared to be adequate not only to the fortune which she then had, but even to what she afterwards became entitled to by accident.

Further; it was apprehended, that the decree was not warranted by any precedent, and had extended the power of a Court of Equity farther than has been usually done; it being in the matter of a local custom, which it is not usual for a Court of Equity to enforce. — But should it for argument sake, be taken for granted, that the testator's being made free of the city of *London* was part of the marriage agreement; yet he being now dead, it was become impossible that he should be so; and it appeared strange, that a Court of Equity should consider a man to be a freeman of *London* as to one particular purpose only; viz. to restrain him from disposing of his personal estate as he had thought fit to do by his will; the inconveniences of which were found to be so great, that by a statute 11 *George I.* such who are actually freemen of the city, are now in a great measure set free from such restraint. It would not surely be insisted upon, that the testator in his life-time, could by virtue of this pretended agreement, have claimed or enjoyed any of the real privileges and advantages of a freeman of the city of *London*; and therefore it would be strange to say, that now he was dead, his personal estate should be subject to the custom of the city, of which, for the improvement of that estate, he could enjoy none of the privileges while alive. Nay, it might be questioned, whether by the settlement made previous to the testator's marriage, his widow was not barred of any customary share of his personal estate, even though he had actually been a freeman. That the decree being absolute, and the appellant being an infant at the time of its being pronounced, and no day being given him to shew cause after his coming of age, it was in that respect erroneous. That after so great a length of time, the testator might have reason to apprehend, that he was under no obligation to become a freeman of *London*, and might thereby presume that he had no occasion to lay out his personal estate in the purchase of lands;  
upon



upon which if he had so done, the custom of *London* could have had no effect.

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Upon the hearing of the cause, the respondents produced the two following orders of the Court of Aldermen; viz.

“ 1676. *Novemb.* 14. *Ordered*, That Mr. *Frederick* and Mr. *Peake*, having neither of them taken their freedoms of this city, notwithstanding several engagements by them heretofore made in this court, be warned to appear before this court on *Thursday* next. ——— 1678. *January* 14. *Ordered*, That Mr. *Frederick* and Mr. *Normansell* have notice to appear before this court, on this day se’nnight.” — They also produced the order before stated, of the 15th of *March*, 1680, and from these several orders would infer, that the proposal of the Court of Aldermen to the testator for taking his freedom, at the time when they gave him the licence to marry, was intended for his wife’s benefit; and that his promise so to do was part of his marriage agreement, and of the condition of the licence. — But it did not appear, that the testator attended the court upon either of the two first orders, and it was presumed he did not; nor did it appear, that he had any notice to attend upon the day that the last order was made. And tho’, upon debate of the matter, the Court of Aldermen declared their opinion, that upon the testator’s not having taken his freedom according to his promise, his wife, if she survived him, would not by the custom of *London* be entitled to the thirds of his personal estate; yet they did not declare their opinion, that this promise was part of his marriage agreement, or of the condition upon which the licence was granted him to marry: For in that case, the court had a power of punishing him by fine and imprisonment at their discretion; and would no doubt have executed that power, as they did in the case of the marriage of *Ann Marescoe*, the sister of *Leonora*, when they fined *David Gansell* 1500*l.* and committed him to *Newgate* till it was paid, for marrying her without the consent of the court; and they also committed *Jacob David* to *Newgate*, who married the mother, until he paid a fine of 2000*l.* for giving the said *Ann* in marriage. But after all their debate upon this case, they were so well satisfied that the making a suitable settlement on *Leonora* was the single condition of their



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licence to the testator to marry her, and that the promise of taking up his freedom was but collateral; that the only order they made was, to refer it to the Recorder and Common Serjeant, to see if the settlement and marriage agreement were made according to the direction and intent of the court. And after this, nothing further was done in the matter, either by the Court of Aldermen or any of *Leonora's* relations on her behalf, till the time of the testator's death, which was forty years afterwards; and even tho' there were such unhappy differences between him and her, as have been already stated.

But the respondents have thought fit to make three objections to this appeal: I. That several parts of the testator's personal estate, which they have respectively received under the decree, have been since settled upon the respective marriages of the testator's daughters; and that part of what the widow, in her life-time, gave to the respondent *Sir John Frederick* out of her share, which was allotted to her under the decree, was settled upon his marriage; and that it would be a great hardship to break into these settlements. II. That *Sir Thomas Frederick*, the appellant's late father, had done many acts whereby he testified his consent to, and approbation of, the decree. And III. That the appellant himself, since he had attained the age of 22, had signified his consent to the decree, and the reports and proceedings subsequent thereto, by his moving the Court of Chancery for an order to have his share assigned to him.

In answer to the *first* objection, it was said, that nothing done subsequent to the decree during the appellant's infancy, by any agreements made between the respondents, could alter or vary the justice of the case, from what it was when the decree was pronounced; but that with regard to the appellant, the merits of the case must be considered as they appeared to be at the hearing of the cause: And the rather, as all the respondents very well knew, that the decree under which they had their distribution, contrary to the testator's will, was made against the appellant, then an infant; and that tho' no day was given him to shew cause against it, after he should come of age, yet that he would nevertheless have the liberty of an appeal against it, upon which that decree might be reversed, if it should not appear



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appear to be just and right. But however, the appellant voluntarily offered, that such parts of the testator's estate, distributed under the decree, as upon the respective marriages of the respondents his daughters, should appear to have been really and *bona fide* settled to the use of their respective husbands and children, and such part thereof as was given by *Leonora*, his widow, in her life-time, to the respondent *Sir John Frederick*, or distributed to him under the decree, and should appear to have been really and *bona fide* settled on his marriage for the benefit of his wife and children, should remain and be enjoyed according to such respective settlements; provided, that this offer should be without prejudice to the appellant, in relation to the rest of the estate in question. By this concession of the appellant, a considerable part of the testator's estate would remain to the respondents his daughters; and the respondent *Sir John* would retain thereout 1,000*l. per ann.* contrary to the testator's will, besides above 1,300*l. per ann.* which he enjoyed under the testator's marriage settlement.—So far was the appellant from being desirous of breaking thro' any of those settlements which had been respectively made on good and valuable considerations, altho' he considered it as parting with so much of his own estate.—As to the *second* objection it was said, that as to any acts done by the appellant's late father, which might imply his consent to, or approbation of, the decree; nothing could thence be inferred, to prejudice the right of the appellant to any part of the estate given him by the will of the testator his grandfather.—And as to the *third* objection it was insisted, that the appellant's moving the Court of Chancery for such part of his grandfather's estate as remained in the hands of his executor, could not be construed into any approbation of the decree; because so much was certainly due to the appellant in all events, and might be received by him without prejudice to his controverting the decree as to the residue. Besides, the appellant was but lately returned from his travels abroad, and was unacquainted with the circumstances of the case; but afterwards apprehending himself aggrieved by the decree, the order made upon that motion had never been carried into execution.

On behalf of the respondents it was urged, that the settlements made previous to the application to the Court of Aldermen, were not in their nature, nor were intended to be final, but  
subject

P. Yorke.  
C. Talbot.



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subject to their approbation, and to be varied and altered as they thought proper. That they were considered by all parties only as proposals, and especially by Sir *John Frederick* and his son, and therefore Sir *John* offered to make up and enlarge the same to the satisfaction of the court; and this was the stronger, because the relations had no power to dispose either of the person or fortune of the orphan, without the consent of the court. That these settlements, considered by themselves alone, would appear to be defective in value with regard to the portion, as well as in not providing for younger children; and to be in no degree equal to a settlement, which was proved in the cause to have been required by the Court of Aldermen, and to have been accordingly made, upon the marriage of Mr. *Leukner* with *Jane*, one of *Leonora's* sisters, and whose portion was no more than equal to hers; and the estate which was now come to the respondent Sir *John* under these settlements, was not worth near so much as the fortune which his father acknowledged to have received with Sir *John's* mother, viz. 25,000*l.* It was reasonable, therefore, that the Court of Aldermen should insist upon the promise to take the freedom, as well to secure a provision for the younger children, as to increase that which was proposed to be made by the settlement for the wife and the eldest son of the marriage; and the licence to marry was granted upon that express promise. That this promise was evidently part of the marriage agreement, because it was made in open court, upon application for licence to marry, and was entered in the same act of court with such licence and the direction of the court touching the settlement, which altogether constituted one entire and compleat agreement; and *Thomas Frederick*, by desiring afterwards at the same court to be admitted to his freedom, further confirmed his first engagement: That this contract was transacted in the most solemn manner, and made upon the most meritorious consideration, and being made upon the marriage of an orphan, ought to receive the most liberal construction in favour of her and her children: Besides, it was just and reasonable in itself, and being a promise made in a court of record, was stronger than if a covenant for that purpose had been inserted in the deeds. That all agreements made upon a valuable consideration, are, in equity, considered as performed at the time, when, according to the tenor of them, they ought to have been performed, and are deemed to have the same consequences; because the party contracting, or any claiming



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claiming voluntarily under him, ought not to profit by his own neglect or default, nor should those for whose benefit such contract was made, be sufferers by that default. That the appellant's attempt to overturn all these solemn proceedings, was the more extraordinary, when it was considered, that in lieu of the present reasonable division of the estate, under which the appellant himself had so very large a share, he would establish his grandfather's will, which bore upon the face of it so great and unnatural an inequality: And his directing, that even the small legacies thereby given to his eldest son and daughters, should be upon express condition of their not contesting his will, either in law or equity, and giving releases of all claims upon his estate, was the more severe, because they could have no claims upon any other account than this, which they now so justly insisted upon, and which was allowed them by the decree; and shewed the testator's consciousness, that there was a foundation for such claim. That as the decree was just in itself, and agreeable to the rules of equity, so it was apprehended to have received confirmation from the acquiescence of all parties for near ten years, and also from the assent of the appellant himself, upon his applying to the court, after attaining his age of 22, for his share of the estate under the decree. But if it should now be reversed, the respondents might be ordered to perform that, which, by reason of their marriage settlements was become impossible, and which would throw themselves and their families into the utmost confusion. If, on the contrary, the decree should be affirmed, every branch of the family would remain in the same condition they had been in for near ten years past; the several marriage settlements would be in peace, and all persons claiming under them would enjoy the benefits and provisions thereby stipulated. As to the objection, that the appellant was an infant at the time of pronouncing the decree, and yet had no day given him to shew cause against it on his coming of age; it was said to be an objection against the constant and uniform practice of the court; for all decrees relating to personal estates and matters of account, where it is necessary to make infants parties, are always absolute, without allowing the infant a day to shew cause; and it would introduce the greatest confusion to have this method broke into. But this objection was still more extraordinary in the present case, where the appellant, long after attaining his age of 21, had applied for and obtained an order to carry the decree into



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DECREE  
affirmed.  
Journ. vol. 23  
P. 703.

execution. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree, reports and orders therein complained of, affirmed: And it was further ORDERED, that the appellant should pay the respondents Sir *John Frederick*, *Thomas Powell* and his wife, and *Rumney Diggle* and his wife, 200*l.* for their costs.

Case 3.

*Jane Vernon*, Widow, Executrix and }  
Devisee of *Thomas Vernon*, Esq; } Appellant.

*George Vernon*, Esq; and Sir *Charles*  
*Vernon*, Knt. Brothers of the said }  
*Thomas Vernon*, and *Charles Vernon* } Respondents.  
and *Thomas Vernon*, Infants, the two }  
Sons of the said Sir *Charles Vernon*, }

24th March, 1731.

2 Wms. 594.  
Viner, vol. 11.  
p. 176. ca. 2.  
2 Eq. ca. ab.  
28. ca. 33.

**HENRY** *Vernon* made his will at *Aleppo* the 23d of September, 1691, whereby he gave several legacies, and after payment thereof, and of his debts and funeral charges, he bequeathed the residue of his estate, and appointed his executor in the words following, viz. “*Item*, I give and bequeath the  
“ remaining part of my estate, goods, moveables, and what-  
“ soever else by any kind of right or title may belong, appertain  
“ or appear due to me, to my dear brother *Thomas Vernon*; but  
“ in case he should die without heirs male of his body, I do in  
“ such case give and bequeath this legacy of the remaining  
“ part of my estate, to be equally divided between my brother  
“ *George Vernon* and my brother *Charles Vernon*.—I make and  
“ ordain the said *Thomas Vernon*, my dear brother, to be my  
“ full and only executor; but in case of his mortality, I do  
“ appoint my honourable father Sir *Thomas Vernon* my sole  
“ executor, requiring either of them, in the name of God, to  
“ see this my will and testament performed as aforesaid.”

This



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This will the testator wrote with his own hand; and by a codicil written also with his own hand under his will, and dated the 25th of *January*, 1692, he gave some other legacies, and confirmed his said will in every particular. And on the 14th of *November*, 1694, he made another codicil, wh by he gave several other legacies, and confirmed his will and first codicil.

From the time of making this will and codicils, the testator continually resided at or near *Aleppo*; so that he had no opportunity of taking proper advice upon the form of his will, and on the 18th of *November*, 1694, he died at *Aleppo*.

Soon after the testator's death, *Thomas Vernon*, his brother, proved the will and codicils, and possessed himself of the testator's estate and effects; and after payment of his debts, legacies and funeral expences, the surplus amounted to above 10,000*l*.

*Thomas Vernon* being afterwards about to marry the appellant, and being conscious how great a sum of money he had received under his brother's will, and intending, in case he should have no heirs male of his body, to make some provision for the respondents, and thereby, in some measure, answer the testator *Henry's* intent, expressed in his will; he therefore included the respondents *George Vernon* and *Sir Charles Vernon*, in the articles made previous to that marriage.

And accordingly by articles of agreement, dated the 6th of *September*, 1695, between *Sir Thomas Vernon* and *John Weston*, Esq; of the first part; the said *Thomas Vernon* and the appellant, by her then name of *Jane Stile*, of the second part; and *John Dibble* and *Anne Stile*, sister of the appellant, of the third part; reciting, that a marriage was then intended between the said *Thomas Vernon* and the appellant, with whom he was to have a portion of 1,500*l*. in money, and that the appellant's uncle *John Stile*, Esq; had, by his will, devised to her his lands in or near *Cranly* and *Cobham* in *Surry*, which were agreed to be conveyed to the use of the said *Thomas Vernon* for life; remainder to the appellant for life; remainder to their first and other sons in tail male; remainder to their daughters in tail, as tenants in common; remainder to the right heirs of the said *Thomas Vernon*:



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*Vernon*: He the said *Thomas Vernon* covenanted for himself and his heirs with Mr. *Dibble*, that he would, within four years after the marriage, purchase the inheritance in fee simple of some manors and lands within 50 miles of *London*, or lands within the county palatine of *Chester*, which had formerly been in the family of the *Vernons*, of the clear yearly value of 350*l.* and settle the same to the use of the said *Thomas Vernon* for life, *sans* waste; remainder to *Dibble* and his heirs, to preserve the contingent estates; and after his death, as to so much of the premises so to be purchased, as should be of the value of 150*l. per ann.* to the use of the appellant for her life for her jointure, and in bar of her dower and customary part of his estate, as he was a freeman of *London*; and as to the residue of the premises so to be purchased, to the use of *Dibble*, his executors and administrators for 99 years, if the appellant should so long live, in trust for the appellant for her life; remainder of the whole estate, to the first and other sons of the said *Thomas Vernon* and the appellant in tail male; remainder to the heirs male of the body of the said *Thomas Vernon*; remainder to the respondent *George Vernon* for life, *sans* waste; remainder to his first and other sons in tail male; remainder to the respondent Sir *Charles Vernon*, for his life; remainder to his first and other sons in tail male; remainder to the right heirs of the said *Thomas Vernon*. — But the 99 years term was to be void, if the appellant, when she came of age, did not settle her own lands to the above uses.

The marriage was soon afterwards solemnized, and Mr. *Vernon* purchased manors and lands of inheritance of a considerable yearly value at several times, and particularly an estate in the county of *Chester*, which had formerly been in the family, and was then about the value of 350*l. per ann.*; but he never settled these lands, or any other lands whatsoever, to the uses of the articles.

On the 26th of *June*, 1723, the said *Thomas Vernon* made his will; and thereby devised all his real and personal estate to the appellant, subject to the payment of his debts, and 5000*l.* a-piece to his three daughters, and appointed her sole executrix. — On the 26th of *August*, 1726, he died without issue male, leaving three daughters, *Jane*, *Arabella*, and *Matilda*;

and



and soon afterwards the appellant proved his will, and entered upon all his real estate, of a very great yearly value, and possessed herself of his personal estate, to a considerable amount.

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The respondents *George* and *Sir Charles Vernon* then applied to the appellant, and desired she would, in a reasonable time, either make a settlement of lands to the value of 350*l. per ann.* out of those which were purchased by *Mr. Vernon* in his lifetime, and devised to her by his will; or purchase and settle other lands of the like value, according to the articles: This she at first seemed willing to do, and accordingly her brother-in-law *Mr. Hornby*, by her direction, wrote a letter to the respondent *George Vernon*, dated the 10th of *September*, 1726, containing this paragraph; viz. "As to the marriage articles, she says she was directed by *Mr. Vernon* to comply with them in a convenient time." And on the 2d of *November* following, the appellant herself wrote a letter to the respondent *George Vernon*, "promising to make the settlement, as she knew it was first intended, and that she was taking all proper measures to do it as soon as she could; and that if there was any estate that lay near the respondent *George Vernon*, that she could have upon reasonable terms, she should always chuse to do what she thought to the advantage of them both."

But the appellant afterwards refusing to perform these promises, the respondents in *May*, 1727, exhibited their bill in the Court of Chancery against her and *Mr. Dibble*, praying that the appellant might be decreed to settle some of the lands already purchased, of the value of 350*l. per ann.* or to purchase other lands of that value, and settle the same to such uses as were still subsisting in the marriage articles.

To this bill the appellant put in her answer; and thereby admitted assets of her husband more than sufficient to satisfy his debts, funeral charges, and daughters portions, and the demands of the respondents, in case the Court should be of opinion that they had any right thereto; but insisted, that she should not be obliged, in prejudice of the said *Thomas Vernon's* children, to make any such settlement as was prayed by the bill.



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Issue being joined, and witnesses examined on both sides, the cause came on to be heard before the Lord Chancellor *King*, on the 8th of *May*, 1731; when his Lordship declared, that the articles ought to be carried into execution, and that lands of the value of 350 *l. per ann.* ought to be purchased and settled to the uses mentioned in the articles, which were still subsisting; and decreed, that the appellant, who had by her answer admitted assets of her testator, sufficient to answer the respondents demands, should, with the approbation of the Master, purchase lands and tenements of the yearly value of 350 *l.* according to the description in the articles mentioned; and should likewise, with the approbation of the Master, settle the same to such of the uses and trusts mentioned in the articles as were then subsisting, so far as the death of parties would admit. The purchase was to be made in the names of trustees, to be approved of by the Master, and any of the parties were at liberty to propose a purchase or purchases before the Master, for the purpose aforesaid.

C. Talbot.

N. Fazakerley.

From this decree the present appeal was brought; and on behalf of the appellant it was insisted, that neither *Henry Vernon's* estate, nor the advancement of *Thomas Vernon* by his father, were any consideration for the limitations in the articles to the respondents; nor ought the appellant to be prejudiced by any letters written by her since her husband's death, when she was under great affliction, and utterly ignorant of the law. That these limitations to the respondents were merely voluntary, the respondents *George* and *Sir Charles Vernon* being no parties to the articles, nor did any consideration move from them, or any other person on their behalf. That tho' *Sir Thomas Vernon* the father was a party, yet there was no covenant moving from him, not so much as one acre of land, or a shilling in money, tho' the said *Thomas Vernon* was then his eldest son; nor was the covenant of *Thomas* made with his father, but with *Dibble*, who was a relation of the appellant. That altho' *Thomas Vernon* lived above 30 years after the articles, yet he was never desired by any of the respondents to make the settlement, nor did he ever think himself obliged to make any settlement on them; and it would be a very great hardship upon the appellant and her children to be now obliged to make it. That if the settlement had been made by *Mr. Vernon* in his life-time, he would have



have been tenant in tail, and consequently, by suffering a recovery, might have barred the remainders limited to the respondents, whenever he had thought proper. And, that the respondents being merely volunteers, were not, under the circumstances attending this case, entitled to any assistance or relief in a Court of Equity.

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On the other side it was urged, that *Henry Vernon* made his will in a place, where he could not have proper advice and assistance to make it agreeable to the forms of law; but his intention was clearly expressed, that his personal estate should be so disposed of, that it should go to his youngest brothers the respondents *George* and *Sir Charles Vernon*, in case of the death of their elder brother *Thomas* without male issue; and a Court of Equity will always pursue the intent of a testator, if it appears clear in his will, as far as it can be carried into execution. But if the testator's intention in this case could not be directly fulfilled, yet as it appeared that there was time more than sufficient after his death, for *Thomas Vernon* to receive the news of it and an account of his estate, before the making of his marriage articles; it was to be presumed to be part of the consideration for the remainders thereby limited to the respondents *George* and *Sir Charles Vernon*. And as *Sir Thomas* their father insisted upon that limitation, and afterwards declared that it should never have been a match, if the appellant and her friends as well as *Thomas Vernon* had not agreed to make the settlement in that manner; the father thereby contracted for a benefit to the other branches of his family. Besides, it appeared in proof, that this marriage was proposed in the lifetime of *Henry Vernon*, but rejected; and after his death, by by whom the estate came, was agreed to; so that it could not be called voluntary, but was part of the marriage articles. As to a pretence mentioned in the appellant's answer, that *Sir Thomas Vernon's* promise to give the rectory of *Farnham* to his son *Thomas*, was the consideration of his including his brothers in the articles, it was totally without foundation; for it was proved in the cause, that *Sir Thomas Vernon* often declared, that as the parsonage was given to him being a younger brother, he would give it to a younger son: And it appeared by a letter from *Thomas Vernon* to his father, dated the 9th of *April*, 1707, that he knew his father had by his will devised this rectory

P. Yorke.

T. Lutwyche.



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rectory to the respondent *George*; and instead of insisting upon any promise of its being given to him, he made it his humble desire to his father, that he would devise the same to him upon his paying 13 years value for it; and in his letter proposed the form of a codicil for that purpose. Accordingly Sir *Thomas*, after being greatly importuned by his son *Thomas* on this subject, did by a codicil give this rectory to him, upon condition of his paying the respondent *George* 14 years value for the same; but this condition not being complied with, the rectory remained to the respondent *George*. Admitting however, that if the testator *Thomas Vernon* had made a settlement pursuant to the articles, he might afterwards have defeated the limitations by a common recovery; yet as he did not think fit to do so, his covenant remained in force, and the appellant as his devisee and executrix ought to perform the same; especially as ample provision was made for all his daughters, and as the appellant was to have an estate for life in the lands to be purchased, and as she had admitted a sufficiency of assets. But, supposing it to be only a voluntary covenant on the part of the testator *Thomas Vernon*, to make the purchase of 350*l.* *per ann.* mentioned in the articles, yet it would affect his assets; and he having charged his real estate with the payment of his debts, and the appellant having admitted assets, it was but the ordinary justice of the Court that the covenant should be satisfied out of assets, since there was indisputably enough to satisfy all other creditors. It was therefore prayed, that the appeal might be dismissed, and the decree affirmed.

DECREE  
affirmed,  
Jour. vol. 24.  
p. 66.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

*William*



*William Borough*, Clerk, - - Appellant. Case 4.

Sir *Francis Whicbroke*, Bart. and *John* } Respondents.  
*Harding*, Esq; - - -

17th April, 1732.

THERE is and hath been, time out of mind, at *Latimers*, in the parish of *Chesham* in the county of *Bucks*, a chapel of ease, of which the Lords of the manor of *Latimers* have always nominated the Chaplains; and in the said parish of *Chesham*, there are two distinct rectories or parsonages impropriate, the one called *Chesham Woborne*, and the other called *Chesham Leicester*, with two distinct vicarages thereto belonging.

In the 14th year of the reign of King *John*, a composition or agreement was made between the abbot and convent of *Leicester*, owners of the parsonage of *Chesham Leicester*, of the one part; and *Walter Foliott*, then Lord of the manor of *Latimers*, of the other part; whereby it was agreed, “ that  
 “ all the tithes of the demesnes of the said *Walter Foliott*  
 “ therein mentioned, and all other tithes, oblations and obven-  
 “ tions, of the house of the said *Walter Foliott*, should for  
 “ ever remain to the chapel of *Latimers*; but that all the  
 “ other tithes, as well small as others, and the oblations and  
 “ obventions of all the men of the whole village of *Latimers*,  
 “ should for ever remain to the church of *Chesham*, which the  
 “ canons of *Leicester* possessed, together with one acre of  
 “ wheat, issuing out of the demesnes of *Walter Foliott*,  
 “ neither of the best nor worst; and that the Chaplains who  
 “ administered in the said chapel, should have for their main-  
 “ tenance, out of the grainge of the said abbot, five quarters  
 “ of good clean wheat yearly.”

Upon the dissolution of monasteries, the parsonage of *Chesham Leicester* was granted by the crown to the family of the *Ashfields*; who constantly paid the Chaplain of *Latimers* for the time being, the five quarters of wheat issuing out of the said parsonage yearly; until *Thomas Ashfield*, Esq; then owner of the parsonage of *Chesham Leicester*, and Mr. *Miles Sands*, the then



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Lord of *Latimers*, some time before the year 1630, came to an agreement, that Mr. *Ashfield* should only pay to the Chaplain of *Latimers* four quarters of wheat yearly; and that in consideration of Mr. *Ashfield's* forbearing to receive of Mr. *Sands* the one acre of wheat issuing out of the demesnes of *Latimers*, Mr. *Sands* would give the Chaplain of *Latimers* an equivalent for the fifth quarter payable by Mr. *Ashfield*.

This agreement was observed for some time, till *Richard Balam*, clerk, Chaplain of *Latimers*, being dissatisfied with it, and claiming the tithe of hay and corn of several closes in *Latimers*, which Mr. *Ashfield* had received as belonging to him; *Balam*, in 1630, brought his bill in Chancery against the said *Thomas Ashfield*, as Parson of *Chesham Leicester*, and against *Elizabeth* Countess Dowager of *Devonshire*, then Lady of the manor of *Latimers*, and *William Dell* her tenant; setting forth the said antient composition or agreement, and praying to have the tithes of several closes in *Latimers* allotted to him, and that Mr. *Ashfield*, the Parson of *Chesham Leicester*, might pay him one quarter of wheat, parcel of the five quarters of wheat wherewith the parsonage was charged; Mr. *Ashfield* having only paid him four quarters of wheat yearly, and detained the fifth quarter to his own use.

To this bill the defendants put in their answers; and Mr. *Ashfield* by his answer, denied that the then plaintiff was entitled to the tithe of any of the closes mentioned in the bill, but that the same belonged to him as Parson of *Chesham Leicester*; and he admitted, that he, as Parson of *Chesham Leicester*, had paid to the Chaplain of *Latimers* four quarters of wheat yearly, and conceived no more wheat was due or ever paid to the said Chaplain; but confessed, that he had then in his custody a paper, intitled, *A composition between the Abbot of Leicester and Walter Foliott*; which was taken out of a book kept by the churchwardens of the parish of *Chesham*.

The plaintiff having replied, and issue being joined, divers witnesses were examined on both sides, and on hearing the cause on the 27th of June, 1633, before the Lord Keeper *Coventry*, in the presence of counsel for all parties, except the Countess of *Devonshire*, who made default, the court was of opinion, that



that the demesne lands of the manor of *Latimers* ought to be charged with the payment of tithes to the Chaplain of *Latimers*, as antiently they had been; for discovery whereof, a commission was ordered to issue, directed to *Henry Bulstrode*, *Edmund Waller* and *Thomas Hampson*, Esqrs. to consider of the proofs then taken, and to examine such other witnesses as should be produced by either party; and thereon, and on view of the lands, to set out and distinguish what particular lands were tithable to the plaintiff or defendant *Ashfield* respectively, and finally to determine all matters in variance between the parties, as well touching the said tithes, as concerning the one quarter of wheat yearly, parcel of five quarters claimed by the plaintiff from the defendant *Ashfield*, and the arrears thereof; the court conceiving, that the defendant's composition with *Sands* ought not to prejudice the plaintiff, in case he should make it appear to the commissioners to be an antient duty; the court also left the defendant *Ashfield* to make proof before the commissioners, touching the acre of wheat claimed by him; and upon return of the commissioners certificate, such further order should be taken as should be just.

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A commission issued accordingly, and Mr. *Bulstrode*, Mr. *Waller* and Mr. *Hampson*, the three commissioners, examined several witnesses and made their certificate, taking notice of the antient composition between the Abbot and convent of *Leicester* and *Walter Foliott*, in the reign of king *John*; and after certifying their opinions, touching the tithes claimed by the then plaintiff out of the demesne lands of *Latimers*, they farther certified, that they conceived that the one quarter of wheat claimed by the then plaintiff, and the arrears thereof, were due to the plaintiff, which arrears they valued at 9*l.* and that the defendant *Ashfield* ought to have yearly one acre of wheat out of the demesne lands of *Latimers*, which acre was not to be of the best, nor of the worst, but reasonably to be allotted yearly to him.

Upon hearing the cause on the 25th of *January*, 1633, on this certificate, and the proofs taken by the commissioners, the Court of Chancery decreed, that the plaintiff and his successors should quietly enjoy the tythe of the several closes therein mentioned; and that the defendant *Ashfield* should pay to the plaintiff



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plaintiff the 9<sup>l</sup>. for the arrears of the one quarter of whe at, parcel of the five quarters claimed by the plaintiff, and that the defendant *Ashfield*, his heirs and assigns, should also pay to the plaintiff and his successors for ever, yearly, the said five quarters of wheat.

By another order made in the cause on the 9th of *May*, 1634, upon the motion of the defendant *Ashfield*'s counsel, alledging, that inasmuch as by the composition made between the Lord of *Latimers* and the Abbot of *Leicester*, the one should have five quarters of wheat yearly, and the other should have an acre of wheat out of the demesnes of *Latimers*, neither the best nor worst; and seeing the Parson had no remedy for his acre, but by detaining his five quarters, and praying that the defendant might detain the five quarters till he had an allowance for the one acre of wheat; it was ordered, that the Countess of *Devonshire* should have notice thereof, to the end she might shew cause the first day of the then next term, why she should not allow the acre of wheat out of *Latimers* to Mr. *Ashfield*.

It does not appear that any further proceedings were had in that cause; but it is supposed, that an agreement was made soon after the last order, between *Richard Balam*, the plaintiff, and the Countess of *Devonshire* and Mr. *Ashfield*, that Mr. *Ashfield* should pay to *Richard Balam* four quarters of wheat yearly, or 8<sup>l</sup>. *per ann.* in lieu thereof, and that the Countess of *Devonshire* should pay to *Balam* 40s. a year, in lieu of the quarter of wheat due to him; and that in consideration of her paying the 40s. *per ann.* to *Balam*, Mr. *Ashfield* would discharge her of the payment of the one acre of wheat, due to him out of the demesnes of *Latimers*.

This agreement or manner of payment, was observed many years, during the times of several succeeding Chaplains and Lords of *Latimers*, and all the life-time of Sir *Jeremy Whitchcote*, Bart. who purchased the parsonage of *Chesham Leicester* of Mr. *Ashfield*; and upon the death of Sir *Jeremy* in 1677, the parsonage came to Sir *Paul Whitchcote*, his son and heir, who all along paid to the Chaplains of *Latimers* 8<sup>l</sup>. a year in lieu of the four quarters of wheat; and the Lord of *Latimers*, for the



the time being, also constantly paid to the Chaplains 40s. a year, in lieu of the fifth quarter of wheat.

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On the death of one Mr. *Hughes* in 1703, the appellant was appointed Chaplain of the chapel of *Latimers*, where he duly performed divine service, and received yearly from Sir *Paul Whichcote*, or his tenant of the parsonage, from 1703 to 1708, the 8*l.* per ann. in lieu of the four quarters of wheat, and he also received from the Lord of the manor of *Latimers*, 40s. in lieu of the fifth quarter of wheat.

But in 1709, the appellant and *Robert Gainsford*, the lessee of the parsonage under Sir *Paul Whichcote*, and who usually paid the appellant the 8*l.* per ann. in lieu of the four quarters of wheat, and had the same allowed him in his accounts with Sir *Paul*, having a dispute about the division of their tything, *Gainsford* declared he would not pay the appellant the 8*l.* per ann. any longer, without being compelled to it by law, tho' he at the same time acknowledged it was the appellant's right, but kept the arrears in his hands; and in order to encourage Sir *Paul* to contest the justice of the appellant's demand, *Gainsford* undertook to bear the whole expence of any suit which the appellant should bring against Sir *Paul*, and for that purpose gave a note under his hand to Sir *Paul*, dated the 3d of *December*, 1713, whereby he promised to pay to the Chaplain of *Latimers* the sum of 25*l.* if it appeared he was entitled to the same, and to indemnify Sir *Paul* from the payment thereof, and from all damages, costs or charges by reason of the non-payment thereof; and if it should not appear to be due to the Chaplain of *Latimers*, then he promised to pay the 25*l.* to Sir *Paul* on demand; and Sir *Paul* afterwards suffered *Gainsford* to keep in his hands the 8*l.* per ann. till 1719, about which time *Gainsford* died, the arrears whereof to that time amounting to 88*l.* and the respondent Sir *Francis Whichcote* then being owner of the parsonage of *Cheesham Leicester*, he prevailed on *Ann Harding*, the representative of *Gainsford*, to pay him the 88*l.* for which he gave the following receipt, viz.

“ *February* 11, 1719, Received then of Mrs. *Ann Harding*,  
 “ administratrix of Mr. *Robert Gainsford*, deceased, by the  
 “ hands of Mr. *Griffiths*, the sum of 80*l.* which with 8*l.*  
 “ received of Mr. *Harding*, is in full of money detained by

Vol. IV. L “ Mr.



1732.

“ Mr. *Gainsford* in eleven several years out of the rent, by the  
 “ consent of Sir *Paul Whichcote*, my father, on account of a  
 “ demand made out of his farm by the Chaplain of *Latimers*;  
 “ and whereas the said Mr. *Gainsford* gave my father a bond  
 “ or note to indemnify him on that account, I do promise to  
 “ deliver up and cancel the same as soon as I go to *Quy*, where  
 “ it is, and to indemnify Mrs. *Harding* on account of paying  
 “ me the said money. *Francis Whichcote.*”

Sir *Francis* having thus received the money, and refusing to pay the appellant the arrears of the 8*l.* *per ann.* from the year 1708, tho' divers applications were made to him in the most friendly and respectful manner; the appellant therefore, in *Trinity* term 1723, exhibited his bill in the Court of Exchequer, against the respondent Sir *Francis* and the said *Ann Harding*, which afterwards, upon her death, was revived against the respondent *John Harding*, to have the arrears of the four quarters of wheat yearly payable out of the parsonage of *Cbesham Leicester*, or 8*l.* *per ann.* in lieu thereof, paid to him; the appellant admitting by his bill, that he had all along received of the Lord of *Latimers* 40*s.* *per ann.* in lieu of the fifth quarter of wheat; and also to have the appellant's right to the five quarters of wheat, confirmed and established by the decree of the court.

Issue being joined, and divers witnesses examined, and the cause coming to be heard on the 26th of *November* and the 4th of *December*, 1730, the appellant offered to read, as evidence for him, the orders or decrees, and other the proceedings in the Court of Chancery, in the old cause wherein *Richard Balam*, Clerk, was plaintiff, and *Thomas Ashfield* and the Countess of *Devonshire*, and *William Dell* were defendants; but the court were pleased to refuse to suffer the appellant to read the said orders and proceedings, and ordered that it should be referred to a trial at law, to be had at the then next assizes to be held for the county of *Bucks* upon this issue, whether five quarters, or any other and what quantity of wheat, had been anciently and yearly due and payable by the Impropiator or Impropiators of *Cbesham Leicester*, or by his or their tenant or tenants, to the Chaplain of *Latimers* for the time being; and whether any and what sum of money had been yearly paid in lieu



Heu thereof to the said Chaplain, by the said Impropiator or his tenant; and that after the trial, such further directions should be given as should be just.

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The trial was accordingly had at the ensuing lent assizes, when the jury found a verdict for the respondents; and the cause being again heard on the 21st of June, 1731, upon the equity reserved, the court were pleased to dismiss the appellant's bill with costs, both at law and in equity.

The appellant, therefore, appealed from both these decrees; insisting, that by the old decree and proceedings in the Court of Chancery, his right to the five quarters of wheat, payable out of the parsonage of *Chesham Leicester*, was plainly established; that decree being founded upon a certificate made by three gentlemen of note and character in the county, where the matters in question arise, and in a cause where all the necessary parties were before the court, and particularly Mr. *Ashfield*, the owner of the parsonage, whose interest was thereby bound; the Court of Exchequer ought, therefore, to have permitted this decree and proceedings to be read as evidence, and more especially, as the respondent Sir *Francis* claimed under Mr. *Ashfield*: And if the same had been so read, there would have been no occasion to direct a trial at law, but the respondents, or one of them, ought to have been decreed to pay the appellant the arrears of the 8 *l.* per ann. from 1708, and the five quarters of wheat for the future.

C. Talbot.

J. Willes.

On the other side it was contended to be the constant and known practice of the several courts of law and equity, not to permit any decree or order, made in any other cause in any other court, to be read as evidence, without first producing the whole proceedings in such cause; that the court might be informed, upon what foundation such decree or order had been made, and whether the same had been fairly obtained upon defence and debate of the matter, or *ex parte* and by surprise. That the appellant did not produce any answer of the defendant *Ashfield*, and there being no recital in the decree, the court could not be informed, by any thing but the acts of the then plaintiff, what was the matter in dispute; whether *Ashfield* was at that time Impropiator of *Chesham Leicester*, or whether he put in any answer, or made any defence, or whether the decree had been

P. Yorke.

D. Ryder.



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been fairly obtained. That it would have been unjust in the court to have permitted a decree, made against *Thomas Ashfield*, to be read against the respondent *Sir Francis Whichcote*, as a purchaser of the rectory impropriate of *Chesham Leicester* under him, without the appellant's first shewing that *Ashfield*, at the time of making the decree, was seised of the rectory, and that he was apprised of the suit, and had made his defence. For if the court had permitted this decree to be read, it could have been no evidence against the respondents, or any charge upon the rectory, without shewing that *Ashfield* was, at that time, Impropiator. Besides, it having been obtained near 100 years ago, the appellant ought to have shewn a submission thereto, and a continuance of payment by the several succeeding Impropiators, to the several succeeding Chaplains, in order thereby to have established his right. But as he failed to do this, the directing the issues was very proper, even if the decree had been read, and the most that the appellant could have expected. That if the decree had been proper evidence in equity, it would have been so at law, and the appellant might have used and had the full benefit of it at the trial; but he did not attempt to read it there, from a sense of its not being proper evidence, and therefore had no cause to complain of any injustice done him, or of a verdict against evidence. That the directing issues touching matters of fact, of which the court has any doubt, is usual and proper, in order to inform the court of such facts as are necessary to be ascertained; and as the court had, in this case, directed issues which had been found against the appellant, it was insisted, that the dismissal of his bill with costs was right, and ought to be affirmed.

DECREES  
reversed.  
Jour. vol. 24.  
p. 87.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that both the decrees complained of should be reversed: And it was declared, that five quarters of wheat were yearly due and payable, and of right ought to be paid to the Chaplain of *Latimers*, out of the rectory of *Chesham Leicester*, in such manner as the same were claimed by the appellant in his original bill; but inasmuch as he admitted, that he had in fact received 40s. per ann. from the Lord of *Latimers*, in satisfaction of one quarter of wheat, parcel of the said five quarters, payable yearly as aforesaid; and as it appeared, that during the five years the appellant was paid his demand,



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demand, before the stoppage complained of in the bill, he received 40s. a quarter in satisfaction of the said five quarters of wheat yearly, as well for the four quarters as for the one quarter: It was further ORDERED, that the appellant should be paid for the arrears of the remaining four quarters of wheat, after the rate of 8*l.* *per ann.* from the time that the payment of the said four quarters of wheat was stopped, till the filing of the appellant's original bill in the Court of Exchequer, being fifteen years, which was the time for which the appellant demanded satisfaction by this suit; and that the same should be paid to him by the respondent Sir *Francis Whichcote*, he admitting that he was to indemnify the other respondent, and consenting to stand in his place, and the appellant being contented therewith: And it was also ORDERED, that the respondent Sir *Francis Whichcote*, should likewise pay the appellant his costs of the suit in Equity, to be taxed by the proper officer, deducting the costs of the trial at law, which the appellant was to pay or allow to the said respondent, to be taxed in like manner by the proper officer; and that the said Court of Exchequer should cause this order and judgment to be put in due execution accordingly.

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The Right Reverend *Thomas*,  
Lord Bishop of *Ely*,

} Plaintiff

Case 5.

*Richard Bentley* D.D. Master  
of *Trinity* College in *Cam-*  
*bridge.* - -

} Defendant

} in Error.

15th February 1732.

**T**HIS writ of error was brought upon a judgment given by the Court of King's Bench, in an action upon a prohibition; in which Dr. *Bentley*, who sued as well upon the King's account as his own, was plaintiff; and the Lord Bishop of *Ely*, was defendant.

Fitz. Gibb.  
107. 305.  
Strange 912.  
Viner, vol.  
17. p. 155.  
ca. 13.  
Grounds and  
Rudiments of  
Edit. p. 324.

Law and Equity 32. ca. 4. Burn's Eccl. Law, vol. 1. 4to

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The declaration set forth, that *Trinity College*, in *Cambridge*, was founded by King *Henry VIII.* by letters patent dated the 19th of *December*, in the 38th year of his reign; and was thereby incorporated by the name of the Master, fellows and scholars of the Holy and undivided *Trinity*, within the town and university of *Cambridge*, of the foundation of King *Henry VIII.* and was impowered to purchase lands and hereditaments; with a saving to the King, his heirs and successors, amongst other things, of the right to name the master, from time to time as vacancies should happen. — That Queen *Elizabeth*, in the 2d year of her reign, gave certain statutes to the said college; and particularly the 40th statute, intitled,

*De Magistri si res exigat amotione.*

“ Quoniam capite gravi aliquo morbo laborante cœtera cor-  
 “ poris membra vehementer quoque vexari solent, idcirco  
 “ statuimus & ordinamus, ut si magister collegii in suo officio  
 “ obeundo admodum negligens & dissolutus repertus fuerit,  
 “ aut de inhonesta vitæ ratione aut incontinentia suspectus;  
 “ per Vice-magistrum & reliquos septem seniores aut per  
 “ majorem partem eorum, quorum conscientiam quantum  
 “ possumus in hac re oneramus, sicut Domino Jesu rationem  
 “ reddituri sunt, cum omni lenitate & modestiâ admoneatur:  
 “ Qui, si hoc modo admonitus non se emendaverit, secundo  
 “ similiter admoneatur, sin autem neque tum quidem resi-  
 “ puerit, Vice-magister & reliqui seniores vel major pars  
 “ eorum rem omnem visitatori episcopo Eliensi qui pro tempore  
 “ fuerit aperiant, qui et eam diligenter cognoscat, & cum  
 “ æquitate definiat; cujus sententiæ magistrum sine ullâ appel-  
 “ latione omnino parere volumus sub pœnâ loci sui imperpe-  
 “ tuum amittendi. Porro si dictus magister coram dicto visitatore  
 “ aliquando examinatus, et vel de hærescos vel læsæ majestatis  
 “ crimine, vel de simoniâ, usuria perjurio coram judice commissio,  
 “ furto notabili, homicidio voluntario, incestu, adulterio, for-  
 “ nicatione, dilapidatione bonorum collegij vel de violatione  
 “ statutorum ejusdem, vel denique de alio quovis consimili  
 “ crimine notabili, coram prædicto visitatore legitime convictus  
 “ fuerit, sine morâ per eundem Vice-magistrum officio magistri  
 “ privetur; neque ullam ei appellationem aut ullum aliud juris  
 “ remedium permittimus, sed cuncta quæ in hac causâ tenta-  
 “ verit



“verit irrita esse volumus & decernimus ipso facto.”—The Doctor then averred, that he was, and long had been, Master of the said college, and during his mastership had constantly observed the statutes; but that notwithstanding, the Bishop of *Ely*, without any previous admonition given him by the Vice-master and major part of the seven senior fellows of the said college, or any complaint made of him, by the said Vice-master and seniors, did, about the 3d of *April*, 1729, cause to be served upon him a citation in the following words:

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“To the reverend *Richard Bentley*, D. D. and Master of the college of the Holy and undivided *Trinity*, in the university of *Cambridge*; by virtue of a citation herewith shewn unto you, under the seal of the right reverend father in God, *Thomas*, by Divine permission, Lord Bishop of *Ely*, and, as such, Visitor specially authorised and appointed by the 40th chapter of the statutes given by Queen *Elizabeth*, of blessed memory, to the said college; to examine the Master of the said college for the time being, of or concerning certain crimes or enormities mentioned or expressed in the second member of the said 40th chapter: I cite you to appear before the said Lord Bishop, in the hall of his palace, commonly called *Ely-House*, situate in the parish of *St. Andrew, Holborn*, on *Monday* the 5th day of *May*, in this present year 1729, between the hours of three and five in the afternoon of the same day; then and there to answer to certain articles and interrogatories touching and concerning the male-administration of your office of Master of the said college, and particularly the dilapidating or wasting the goods and revenues of the said college, and violating the statutes thereof, which will be then objected to you before his said Lordship, as Visitor of the Master of the said college for the time being, at the promotion of *Robert Johnson*, clerk, Batchelor in Divinity, and one of the fellows of the said college; and farther to do and receive as to law and justice shall appertain, under pain of the law and contempt thereof. *Holman.*”

The Doctor further set forth, that the Bishop upon his appearance charged him with divers crimes; the preface of which charge was in these words: “In Dei nomine Amen. Nos Thomas permissione divinâ Eliensis episcopus ac visitor,

“spe-



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“ *specialiter assignatus & sufficienter autorizatus vigere statuto-*  
 “ *rum per Elizabetham beatæ memoriæ quondam hujus incliti regni*  
 “ *reginam, sub sigillo suo magistro socijs et scholaribus collegij*  
 “ *Sacrofanctæ & individuae Trinitatis, infra universitatem Canta-*  
 “ *brigensem, representatorum & commendatorum ad examinandum*  
 “ *Magistrum collegij prædicti de & super criminibus & exces-*  
 “ *sibus in secundo membro capitis quadragesimi dictorum statuto-*  
 “ *rum expressis et mentionatis, & ad pronunciandum & decernen-*  
 “ *dum de & super convictione ejusdem Magistri post examina-*  
 “ *tionem ipsius habitam; tibi Richardo Bentley sacrae theologiæ*  
 “ *professori Magistro hodierno collegij prædicti, articulos ca-*  
 “ *pitula sive interrogatoria infra scripta malam administrationem*  
 “ *officij tui qua Magistri dicti collegij, criminaque & excessus*  
 “ *in prædicto secundo membro dicti capitis quadragesimi statuto-*  
 “ *rum prædictorum expressa & mentionata, & præsertim dila-*  
 “ *pidationem bonorum et status & reddituum sive proventionum*  
 “ *dicti collegij & violationem statutorum ejusdem per te com-*  
 “ *missa & perpetrata tangentia & concernentia, ex officio nostro*  
 “ *quâ visitatore prædicto ad promotionem reverendi viri Roberti*  
 “ *Johnson clerici sacrae theologiæ baccalaurei & unius e dicti*  
 “ *collegij sociis, damus objicimus & articulamur prout sequi-*  
 “ *tur; viz.*” [These articles were set forth *verbatim* in the  
 declaration, and in an appendix to the printed case, from  
 whence they are copied in the note subjoined\*.] — The  
 declara-

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\* *Imprimis*, We article and object to you the said Dr. *Richard Bentley*, that you the said Dr. *Richard Bentley* do know, believe, and have heard, that Queen *Elizabeth* of blessed memory, formerly Queen of this realm, did by letters patent, bearing date the 4th of the calends of *April*, in the second year of her reign, make, constitute, appoint, and ordain certain rules, constitutions, or statutes, for the good government, order, and discipline, and for the better preservation of the estates, and administration of the revenues of the royal college of the Holy and undivided *Trinity* of the university of *Cambridge*, of the foundation of King *Henry* the 8th, her father: And the said statutes were by her confirmed under the broad seal, and received and accepted by the Master, fellows and scholars of the said college. *Et hoc fuit & est verum, et objicimus & articulamur conjunctim & divisim & de quolibet.*

II. *Item*, We article and object to you the said Dr. *Bentley*, that in and by the 40th chapter of the said statutes, the Bishop of *Ely*, for the time being, is appointed, authorised and empowered, at any time to examine the Master of the said college upon and concerning fundry great and enormous crimes, in the latter member of such statutes particularly enumerated and expressed; as in and by the said statutes now remaining among the archives of the said college, to which the party proponent refereth himself, doth and may appear. *Et hoc fuit et est verum, & objicimus & articulamur ut supra.*

III. *Item*,



declaration then objected to the articles.—That they were uncertain; containing a charge of negligence only, and not violations of the statutes within the meaning of the latter part of the 40th statute of Queen Elizabeth, and therefore could not be

III. *Item*, We article and object to you, the said Dr. Richard Bentley, that you the said Dr. Richard Bentley was, in and about the year 1699, by a grant, or letters patent from his late Majesty King William the third, constituted and appointed Master of the aforesaid college of the Holy and undivided Trinity in Cambridge, and was afterwards duly admitted Master thereof, and have ever since possessed and enjoyed, and do now possess and enjoy the said mastership. *Et hoc fuit & est verum, & obijcimus & articulamur ut supra.*

IV. *Item*, We article and object to you, the said Dr. Richard Bentley, that you the said Dr. Richard Bentley did, at the time of your admission into the mastership of the said college, take the oath enjoined and prescribed by the second of the said statutes of Queen Elizabeth, to be taken by every Master at and before his admission into such mastership, and that you then swore (*inter alia*) in the words following; *viz. Ego Richardus Bentley, à regis majestate magister hujus collegij Sanctæ & individue Trinitati dedicati designatus, juro & Deo teste promitto ac spondeo, primo me veram Christi religionem omni animo amplexurum &c. Deinde, me omnia dicti collegij sacerdotia, fundos, prædia, possessiones, dominia, redditus, proventus, jura, libertates, privilegia, omnia denique bona sine imminutione aut vastatione (quantum in me situm erit) conservaturum, statuta collegij in omnibus servaturum, & eadem verè sincerè & omnia secundum sensus grammaticales interpretaturum, omnes & singulos socios & discipulos, pensionarios, sifatores & subsifatores &c. Collegij membra ex eisdem statutis ac legibus sine ullius generis aut conditionis aut personarum respectu, gratia, odiove recturum & defensurum, atque ut officarij omnes socij ac discipuli ceteraque collegij abiero, vel jure ac legitime abdicatus fuero, me omnia collegij bona quæ in meâ potestate custodiâve sunt, aut esse debent, Vice-magistro decanis & thesaurarijs collegij, vel statim, si id commodè fieri poterit, vel intra quindecim dies, sine controversiâ tergiversatione aut aliquâ eorundem diminutione redditurum: Et si quam pecuniæ summam id temporis collegio debuero, obfides sufficientes daturum Vice-magistro & ceteris collegij socijs & scholaribus de eadem pecuniâ penitus ante finem trium mensium proxime sequentium dissolvenda; nullam litem, actionemve collegio aut his qui me legitime abdicaverunt eâ de causâ unquam in posterum intentaturum. Hæc omnia in me recipio, Deoque teste me pro virili facturum polliceor, sicut me Deus adjuvet & hæc sacrosancta Dei evangelia. Et hoc fuit & est verum &c. et obijcimus & articulamur ut supra.*

V. *Item*, We article and object to you, the said Dr. Richard Bentley, that you have, ever since such your admission to the mastership, lived and acted in open violation of many of the said rules and constitutions or statutes, so made and provided for the good government of the said college, and in breach of the oath so as aforesaid by you taken. *Et obijcimus & articulamur ut supra.*

VI. *Item*, We article and object to you, the said Dr. Richard Bentley, that by the second chapter of the said statutes it is (*inter alia*) ordained and provided, that the Master of the said college, for the time being, shall be a person no less eminent above other members of the said college for his piety and integrity of life, than he is superior to them by the dignity of his place. Notwithstanding which, you the said Dr. Bentley have, for more than twenty years past, in violation of the said statute, and in breach of your said oath, lived a very irreligious life, and notoriously neglected the public worship of God; and more particularly, by constantly and habitually absenting yourself from Divine service



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be proceeded upon, for want of previous admonitions. —  
That the facts charged were done by the corporation, and would  
therefore, if punishable, be punishable only by the general  
visitor of the corporation, who was the King, and not the  
Bishop

in the chapel of the said college, at the usual hours of morning and evening prayers;  
and suffered, or permitted the officers of the said college in the like manner to neglect the  
same. *Et objicimus & articulamus de quolibet alio temporis spatio &c. Et ut supra.*

VII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you have  
for several years successively elected, and by arbitrary methods procured several persons  
to be elected, Vice-masters of the said college; notwithstanding that such Vice-masters  
did not at any time, in the first year of their being Vice-master, nor in any of the fol-  
lowing years, attend the public worship of God in the chapel of the said college, at  
the usual hours of prayers in the morning, as by the statute they ought to have done:  
And that you the said Dr. *Bentley* have, from time to time, and at all times, suffered  
such open neglect of duty in the said Vice-masters, to pass without censure and un-  
punished, in violation of the said statutes of the said college, and of the oath so as  
aforesaid by you taken. *Et hoc fuit & est verum, &c. Et objicimus et articulamus, &c.*  
*Et ut supra.*

VIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the first  
of the said statutes it is provided, that there shall be four persons in orders of priesthood,  
to serve as Chaplains daily in the chapel of the said college; as by the said statute,  
reference being thereunto had, will more fully appear. *Et objicimus & articulamus*  
*ut supra.*

IX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that ever since  
you have been Master of the said college, the persons appointed to be Chaplains thereof,  
have been allowed by you to be non-resident and absent from the said college, and to  
enjoy and reside upon livings and other benefices, in places very distant and remote from  
the said college; and that not any of the said Chaplains have at any time, been called  
upon by you the said Dr. *Bentley* to reside there, or censured by you for such their non-  
residence. *Et hoc fuit & est verum, &c. Et ut supra.*

X. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the  
eleventh of the said statutes it is ordained and provided, that there shall be a lecture  
read upon some part of the catechism, on every *Sunday* and Holy-day, in the chapel of  
the said college, after the public sermon in the afternoon; and by such statutes, five or  
six of the Fellows ought to be appointed to perform that religious and important duty:  
And from the time of making the said statutes, the names of the several Fellows  
appointed to read such lectures, have been entered in the book called the *Conclusion-Book*,  
or some other book belonging to the college: And that out of the number of those who  
had been so appointed, and gone through a course of such lectures, the college preachers  
ought to be chosen by the Master and eight senior Fellows, when and so often as any  
vacancy shall happen among them; as by the said statutes, reference being thereunto had,  
will more fully appear. *Et ut supra.*

XI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that for twenty years  
past and upward, you have not only neglected, but absolutely refused, though often  
called upon and required so to do, to appoint or fill up the prescribed number of Fellows



Bishop of Ely; but that they were really not punishable at all, because of the act of general pardon of the 7th George I.— And the declaration concluded, that notwithstanding these things were alledged, and the King's writ of prohibition delivered

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to read the said lectures; so that the same have been frequently interrupted, neglected, and discontinued for many months, and sometimes for whole years together. *Et objicimus & articulamus de quolibet alio temporis spatio, &c. Et ut supra.*

XII. *Item*, We article and object to you, the said Dr. Richard Bentley, that more particularly, on or about the 22d day of April, 1719, there being then several vacancies in the prescribed number of Fellows to read the said lectures; it was, at a public meeting of members of the said college, that day held, proposed to you the said Dr. Bentley, by one of the senior Fellows then present, and the rest of the senior Fellows of the said college did then earnestly desire of you, that such vacancies might be supplied and filled up; and a list of several learned and worthy Fellows of the said college, well fit and qualified to read those lectures, particularly Mr. Malled, Mr. Craister and others, were then offered to you the said Dr. Bentley, for that purpose; but that you the said Dr. Bentley absolutely refused to name or allow of, nor did you name or allow of any other person to perform that laudable and necessary exercise, but with great contempt and disdain told them, it was nonsense to talk of putting up five persons to catechise at the same time, or to that effect. *Hocque, &c. Et objicimus & articulamus de quolibet alio tempore, &c. Et ut supra.*

XIII. *Item*, We article and object to you, the said Dr. Richard Bentley, that soon after the premises in the next precedent article mentioned, the aforesaid Mr. Malled and Mr. Craister several times waited upon you, and earnestly desired and entreated you, that they might have leave to read the lectures upon the catechism, according to and in pursuance of the said statutes, in order to their being statutably capable of being elected college preachers; but you absolutely refused them, and turned them away from you with great rudeness and ill manners: And the said Mr. Craister waiting upon you at another time, with the like request, you the said Dr. Bentley refused him, and took him by the shoulders, and thrust him out of the doors. *Hocque &c. Et ut supra.*

XIV. *Item*, We article and object to you, the said Dr. Richard Bentley, that when any vacancy hath happened among the college preachers, you the said Dr. Bentley have refused, though often called upon and required so to do, to call the eight senior Fellows together, within the time prescribed by the said eleventh statute of Queen Elizabeth; so that there have been very frequently several vacancies of college preachers at one time, and some years there were seven, and in other years there were nine places of college preachers vacant together, to the great prejudice and discouragement of such of the Fellows of the said college, as were capable of being, and ought to have been elected into such vacancies. *Hocque, &c. Et objicimus & articulamus de quibuscumque aliis annis. Et ut supra.*

XV. *Item*, We article and object to you, the said Dr. Richard Bentley, that by the 30th of the said statutes it is ordained and provided, that when any livings, in the gift and presentation of the college, shall become vacant, that the same shall, within one month after notice of such vacancy, without further delay, be conferred upon such Fellow of the college as shall be the then senior by degree, as by the statute to which the party proponent refers, will appear. *Et ut supra.*



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vered to the Bishop, yet he afterwards proceeded in order to condemn and deprive the Doctor of his office of Master of the said college, in disinherison of the crown, and to the damage of him the said Dr. *Bentley*, 100*l*.

The

XVI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you the said Dr. *Bentley*, in violation of the said statute, and in breach of your said oath, have frequently, when livings in the gift of the college have become vacant, for private purposes of your own, and in order to carry on your evil practices mentioned in these articles, unstatutably delayed and denied to join in presenting such senior as hath been then statutably qualified to take and hold such living, or any other person whatever thereto, till more than five months have past from the notice of such vacancy. *Hocque, &c. Et objicimus & articulamus de quolibet alio temporis spatio, &c. Et ut supra.*

XVII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the said 11th statute of Queen *Elizabeth* it is further appointed, that every Fellow of the said college, before he can be chosen a college preacher, shall preach a sermon before the Master for the time being, and the fellows and scholars of the said college; and such sermon ought to be approved by the Master and four senior fellows of the said college. *Et ut supra.*

XVIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you have not, for twenty years last past, been present to hear any one of the said probation sermons, save and except on the 23d day of *August*, 1719, being on a *Sunday*, when Mr. *Barnwell* preached; and on that day you did not come into the chapel, till the communion service was begun; but you, the said Dr. *Bentley*, have frequently, and with great scorn declared, that you approved and disapproved of such sermons as you were not present at, by report only; and that you did so by Mr. *Whitfield's* and Mr. *Bouquet's* sermons in particular. *Hocque, &c. Et objicimus articulamus de quolibet alio numero Annorum, &c. Et de quolibet alio tempore, &c. Et ut supra.*

XIX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the 18th chapter of the said statutes it is ordered and provided, that in every week of each term appointed by the statutes of the university, there shall be three disputations in the college chapel; viz. one on *Monday* in philosophy, at which the head lecturer is to preside; another on *Wednesday*, in philosophy or divinity, at which the junior Dean is to preside; and another on *Friday*, in divinity only, at which the senior Dean is to preside and moderate: And that each of such disputations is to continue for the space of two hours, between one respondent and three opponents, on which every fellow and scholar is to perform his part in turn, in person, as appointed, unless excused on some weighty cause, to be allowed of by the Master and Dean of the said college; and in such case, the person so excused may appoint a substitute to dispute in his stead, but is obliged, in person, to perform the like duty, as soon as the cause on which he was excused, is removed or ceases. *Et ut supra.*

XX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you have, for these twenty years past, totally eluded the force and effect of, and have violated the said statute as is hereafter mentioned; viz. First, by directing and appointing that the term in the college shall begin much later and end sooner, than the term in the public university begins and ends; and by such your appointment, the term in the college has very frequently not lasted more than half the public term. Secondly, by suffering the disputations



The Bishop, as to proceeding after prohibition delivered, pleaded not guilty, and thereupon issue was joined; and then, in order to obtain a writ of consultation, he set forth, that King *Edward VI.* gave certain statutes to this college, which the college accepted, and that among them was this statute.

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*De*

putations on *Mondays* and *Wednesdays* to be totally discontinued, and on those days the respondent reads a thesis only, and no opponents ever appear to dispute; and this thro' your wilful neglect. Thirdly, by allowing the disputations in divinity on *Fridays*, to be performed by a respondent and one opponent only, and this exercise is seldom or never performed more than once in each term, and sometimes not at all; and this thro' your wilful neglect. Fourthly, by allowing the Fellows and Scholars of the said college, without any weighty cause, or good and sufficient reason, to appoint substitutes to perform their exercises, and not requiring them, when such pretended cause is removed or ceases, to perform the same in person; and by reason of this last mentioned neglect in you, there are not now, nor for many years have been, above five of the Fellows of the said college at one time, who have regularly and statutably borne any part in the public disputations, either as respondents or opponents. *Hocque, &c. Et obijimus & articulamus de quolibet alio temporis spatio, &c. Et ut supra.*

XXI. *Item*, We further article and object to you, the said Dr. *Richard Bentley*, that by the last mentioned statute it is further appointed and provided, that on every *Tuesday*, *Thursday* and *Friday*, there shall be disputations held in the hall of the said college, in rhetoric and logic, by the senior Sophists and others; and that the head lecturer and the other lecturers shall preside thereat in their turns. And by the 9th statute of the said Queen, it is likewise ordained and provided, that the head lecturer shall take care, that the sub-lecturers under him perform their respective duties diligently and faithfully; and by the same statute it is further appointed, that the said lecturer shall go, at least once in every week to each class, and examine each of the Scholars of the said college, to know what proficiency they have respectively made from time to time, as by the said several statutes, to which the party proponent refers, will appear. *Et ut supra.*

XXII. *Item*, We article and object to you, the said Dr. *Bentley*, that at the time appointed for the election of lecturers and other officers of the said college in the year 1727, you the said Dr. *Bentley* proposed one of the fellows to be head lecturer, and one other of the fellows to be Latin lecturer for the succeeding year: And altho' one of the senior fellows of the said college then objected thereto, on account that both the said fellows so proposed by you, had totally neglected the duty of their respective offices in the preceding year, you replied, as you had frequently done, that such objection concerned the time past only: And then you asked, if they, meaning the aforesaid fellows so proposed by you to those offices, were not to take the oath, meaning the oath required by the statutes for the due discharge of their respective offices; and thereupon you the said Dr. *Bentley*, immediately with your own hand, wrote down the names of the said two fellows, whom you had so proposed, as appointed to such offices. And that neither of the said fellows, so as aforesaid appointed to those offices, did, during that whole year, perform any part of the duty incumbent upon them, nor have they, at any time, been censured or punished by you for such their neglect. *Hocque, &c. Et obijimus & articulamus de quolibet alio tempore, &c. Et ut supra.*



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*De Visitatore.*

Visitator Episcopus *Eliensis* fit.—Omnes et singulos tam humilioris quam altioris ordinis cogat; et de servandis statutis, de veræ religionis cultu, de superstitione papisticâ expellandâ, de honestate morum, de re etiam familiari et domesticâ quærat, singulos

XXIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the 31st of the said statutes it is ordered and appointed, that the several gates of the college shall be opened and shut by the porter, at certain hours therein mentioned; and that at night, when all the gates are shut, the keys shall be carried to the Master, and in his absence, to the Vice-master, and deposited with him; and the porter is obliged personally to perform that duty, as by the said statute to which the party proponent refers will appear. *Et ut supra.*

XXIV. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that in violation of the said statute, and contrary to the true intent and meaning thereof, the keys of the college have not, at any time during these twenty years past, been brought by the porter, and deposited with you the Master, as by the said statute they ought to be; by which means, all manner of persons, as well members of the said college as others, are at liberty to, and frequently do go in and out of the college gates at all hours of the night. And the college porter doth not officiate in that duty himself, but is, with your privity and consent, allowed to act by a deputy, who hath no salary, or other consideration for doing that duty, but only the money given by such persons as make a practice of going in and out of the college gates, at such unstatutable and unseasonable hours; of all which you have been informed, and have had notice. *Hocque, &c. Et obijcimus & articulamus de quolibet alio numero annorum, &c. Et ut supra.*

XXV. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the third of the statutes it is ordained and provided, that when any one of the eight senior Fellows goes out of the said college, he shall substitute the Fellow, who is next in seniority to the eight, and not before deputed by another, to act for him in his absence; and shall enter such deputed Fellow's name in the registry of the said college. *Et ut supra.*

XXVI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you the said Dr. *Bentley*, in breach of your said oath, and in violation of the said last mentioned statute, have all along suffered such of the eight seniors as had occasion to be absent from the said college, to depart from thence without appointing any substitute, or entering the name of any substitute upon the register book; and you have very often called junior Fellows of the said college, who, to your knowledge, were not deputed by any of the seniors, and who, by their standing and distance from the seniority, to your knowledge, were not capable of being deputed, or of transacting any of the affairs of the said college, to make conclusions, and to do other business, which, by the said statute ought to be transacted by the Master and eight senior Fellows, or by their statutable deputies only, and by no other Fellow whatsoever; and such their conclusions, acts and doings, have been constantly entered by you, or by your order, in a book kept for that purpose, as the acts of the Master and eight senior Fellows of the said college. *Et hoc fuit & est verum, &c. Et ut supra.*

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singulos pro magnitudine culpæ corrigat, puniat expellat : Quæ frugi et honesta, pro suâ præstantiâ laudet, ut collegii honos et undatoris mens stare possint ; vitiorum et ignorantia emendationem imprimis spectet : Ei hanc curam severè mandamus, et hortamur

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XXVII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the 34th of Queen *Elizabeth's* said statutes, it is ordered and provided, that the public seal of the said college shall not, at any time, be affixed to any instrument, or writing whatsoever, but in the chapel, and in the presence of the eight senior Fellows of the said college, and of the eight other Fellows next immediately in seniority to them ; and that unless eight of that number should agree with the Master, to the affixing the said seal to any writing or instrument, it shall not be affixed thereto, as by the said statutes, to which the party proponent refers, will appear. *Et ut supra.*

XXVIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you the said Dr. *Bentley*, in breach of your said oath, and in violation of the said statute, have frequently caused the public seal of the said college to be affixed to writings and instruments of great moment and concern, when there have not been sixteen Fellows met together for that purpose ; more particularly as in the following articles is mentioned. *Et ut supra.*

XXIX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that some time in the year 1726, you the said Dr. *Bentley* caused, or suffered the said college seal to be affixed or put to a certain writing or instrument, enabling one *John Kent*, or some other person, in behalf of the said college, to make seizure of a certain quantity of hay in the parish of *Over* in the county of *Cambridge*, in order to commence a law suit with the said parish, when no more than thirteen of the Fellows of the said college had been assembled together in the chapel ; and part of that number, *viz.* Dr. *Ayliffe*, Mr. *Parne* and others, withdrew from the chapel before the seal was so affixed and put to such writing or instrument, and refused to give their consent thereto. *Hocque, &c. Et obijcimus & articulamus de quolibet alio tempore, &c. Et ut supra.*

XXX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that on the 10th day of *August* last past, you the said Dr. *Bentley*, in further breach of your said oath, and violation of the said statute, did cause and procure the public seal of the said college to be affixed and put to a writing, purporting a petition of the Master, Fellows and Scholars of the said college, to the King's most excellent majesty, at the sealing whereof, five of the eight senior Fellows were absent from the said college, and had not deputed any other of the Fellows to act in their stead ; and two only of the three seniors, who were then present, were consenting thereto, and most of the rest of the Fellows then present were junior Fellows, not deputed, nor by their seniority capable of being deputed, to transact any of the affairs of the said college, but were purposely sent for by you to be present thereat, altho' there were several Fellows at that time in the college, who were of much longer standing than many of those present ; and the whole number of Fellows present were fifteen only. *Et hoc fuit & est verum, &c. Et obijcimus et articulamus de quolibet alio tempore, &c. Et ut supra.*

XXXI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the thirteenth of the said statutes it is appointed, that no student whatsoever, who is in possession of, or heir apparent to any land after the death of his father, exceeding the sum



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hortamur ut fideliter in hac causa agat, fibique ante oculos constituat, in extremo judicio pro tribunali Christi, quanta sit omnibus de singulis factis et officiis ratio reddenda.

The

sum or rent of ten pounds a year, shall be allowed to appear as a candidate at the usual time of election of scholars into vacant scholarships of the said college, for any such vacant scholarship; as by the said statute, to which the party proponent refers, will appear. *Et objicimus & articulamus ut supra.*

XXXII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that in the year 1721, there being many scholarships of the said college then vacant, you the said Dr. *Bentley*, at the usual time of election of scholars into such vacant scholarships in the said year, in breach of your said oath, and violation of the said statute, did permit and suffer one *Andrew Hackett*, who was then heir apparent to an estate in lands of more than the yearly rent of 600*l.* sterling, to appear as a candidate at the said election, for one of the said vacant scholarships; and altho' it was then objected to you, that the said Mr. *Hackett* was, by reason of his being heir apparent to such an estate, incapacitated from being a candidate, yet you did not only over-rule such objection, but did give your vote, and procure him the said *Andrew Hackett* to be chosen a scholar into one of the said vacant scholarships, and did afterwards admit or procure, or suffer him to be admitted into such vacant scholarship, by virtue of such election. *Et objicimus & articulamus de quolibet alio tempore, &c. Et ut supra.*

XXXIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the twelfth chapter of the said statutes it is ordered and provided, that all such scholars of the said college as have compleated the degree of batchelor of arts, and such only, shall have a right to become candidates at every election of Fellows of the said college; notwithstanding which, you the said Dr. *Bentley*, in breach of your said oath, and violation of the said statute, did, at the election of Fellows of the college in the year 1723, allow your own son *Richard Bentley*, altho' he had not, to your knowledge at that time, compleated his degree of batchelor in arts, to stand a candidate for a vacant fellowship of the said college; and the said *Richard Bentley* was then elected into one of the fellowships of the said college, then vacant. *Hocque, &c. Et objicimus et articulamus de quolibet alio tempore, &c. Et ut supra.*

XXXIV. *Item*, We article and object to you, the said Dr. *Bentley*, that both before and ever since the said year 1723, you, the said Dr. *Bentley*, in further violation of the statutes, have not suffered, nor would suffer, any person whatsoever to stand as candidates for vacant fellowships of the said college, save batchelors of arts of the third year only; whereby great numbers of other batchelors, who had compleated their degrees, were every year hindered or prevented from standing, or offering themselves to stand as candidates for such fellowships. *Hocque, &c. Et ut supra.*

XXXV. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the oath taken by you, at your admission to be Master of the said college, you are obliged to preserve the whole estate of the said college, and every part thereof, from all waste and diminution; and for the better preservation of the estate and possessions of the said college, it is by the 28th chapter of the said statutes specially ordained and provided, that the Master and Vice-master, the senior Bursar, and one other of the Fellows, who is a preacher for the time being, shall every year diligently visit and survey the college estates in such manner, that all the several estates may be visited and surveyed once in three years; but no such progress, as required by the said statutes, hath at any time

been



The Bishop then averred, that neither he nor any of his predecessors, Bishops of *Ely*, had ever done any thing to destroy the visitatorial power, arising to them from this statute. — He then set forth several of the statutes of queen *Elizabeth*,  
not

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been made, either by you the said Dr. *Bentley* yourself, or by the Vice-master, senior Bursar, and one of the Fellows of the said college for the time being, since you the said Dr. *Bentley* have been admitted into the Mastership thereof; neither have you, at any time since your being Master of the said college, called upon, or required the Vice-master, senior Bursar, or any of the Fellows for the time being, to proceed on such progress or circuit; but you have been wilfully negligent in the premises. *Hocque, &c. Et ut supra.*

XXXVI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that for want of such progresses as are required by the last mentioned statute, the improved value of the estates belonging to the said college are not certainly known; and several leases have been let, by your evil contrivances, for much lesser fines than might have been reasonably demanded for the same: And more particularly, in the year 1717, a lease of a large house, called *Massam House* in the city of *York*, together with several tenements thereto belonging, being all part of the estate of the said college, and in very good condition and repair, and of the yearly value of more than 50*l.* sterling, was, by your fraud and contrivance, made and granted to your brother *James Bentley*, for twenty years then to come, for the fine or sum of 40*l.* only, and no more: And he the said *James Bentley* was, by a covenant in the said lease, allowed to receive and take, to his own use, the arrears of the improved rent of the said house and tenements, which had accrued to the said college, from the expiration of the former lease; and which then amounted to the sum of 30*l.* and upwards. *Hocque, &c. Et obijcimus & articulamus de quolibet alio tempore, et de quibuscumque aliis valore vel summa, &c. Et ut supra.*

XXXVII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that in the year 1727, upon the surrender of the said lease, so as aforesaid granted to the said *James Bentley*, a new lease of the same house and tenements was, by your privity and contrivance, made and granted to *Priscilla Bentley*, for the like term of twenty years, for a fine of twenty pounds only; altho' the said house and tenements had been actually surveyed by the said *James Bentley*, and the real value thereof certainly known to you the said Dr. *Bentley*, before and at the granting each of the said leases. *Hocque, &c. Obijcimus et articulamus de quibuscumque aliis tempore & summa, &c. Et ut supra.*

XXXVIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that notwithstanding the statutes of the said college severely do forbid the alienation of any part of the estates of the said college, yet you the said Dr. *Bentley*, in violation thereof, and in breach of your said oath, did, in the year 1712, by your own sole authority, and without the consent of the eight senior Fellows of the said college, bargain and agree to alienate a piece of inclosed ground belonging to the said college, situate in the parish of *Kirby Kendall*, in the county of *Westmoreland*, and an indenture, bearing date the 23d of *December*, 1712, was, by your privity, procurement and direction, some time in the month of *June*, 1713, prepared and brought into the chapel of the said college, ready to be sealed, whereby the said piece of inclosed ground was absolutely sold and granted to one *Josiah Lambert*, and to his heirs for ever, reserving only four shillings per ann. rent to the use of the said college. *Hocque, &c. Et obijcimus et articulamus de quolibet alio tempore, &c. Et ut supra.*



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not mentioned in the declaration, and averred the acceptance of those statutes by the college. — He then stated the act of parliament made in the 18th year of Queen *Elizabeth*, by which all leases made by colleges, in which one third of the rent is not

XXXIX. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that upon reading of such indenture in the chapel of the said college, the time aforementioned, in the presence of the sixteen senior Fellows of the said college, they all unanimously refused to affix the seal of the said college thereto, as being contrary to the 35th of the statutes of the said college, so made and provided by the said Queen *Elizabeth*. *Hocque, &c. Et ut supra.*

XL. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that some time after the premisses in the next precedent article mentioned, you the said Dr. *Bentley* caused the before mentioned indenture, with several razures, interlineations and obliterations made therein, to be again brought into the chapel, in order to have the public seal affixed thereto, but the same was again unanimously rejected by all the sixteen senior Fellows, who were then assembled together, and at such time you the said Dr. *Bentley* sent a threatening message to the said sixteen seniors so assembled, that in case they persisted in refusing to affix the college seal to such indenture, you would not suffer several leases of other estates belonging to the said college, and for which the fines had been actually paid, or agreed to be paid, to be sealed; but, notwithstanding such your threats, the said sixteen seniors did again refuse to comply with such your illegal and unjust desire. *Hocque, &c. Et ponet ut supra.*

XLI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that notwithstanding the premisses, you did on or about the 28th day of *November*, 1713, in breach of your said oath, and in violation of the said statutes, procure the public seal of the said college to be affixed and put to the aforementioned indenture of bargain and sale, and alienation of the said piece of ground; and the said estate is thereby wholly alienated from the said college for ever. *Et hoc fuit & est verum & obijcimus & articulamus de quolibet alio tempore, &c. Et ut supra.*

XLII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that you have, at several times since your being Master of the said college, made and caused several leases to be made of tythes, arable lands, meadow and pasture, belonging to the said college, without reserving one entire third part, or any part of the rent, to be paid in corn or in money, according to the market price of corn; and more particularly, in the year 1715, a lease of the parsonage of *Swine's-head*, together with the rectory or free chapel of *Barthorp* in the county of *Lincoln*, part of the estate of the said college, was, by your means and procurement, made and granted to one *William Whiting*, for, and at the certain yearly rent of 100*l.* without any reserve of rent to be paid in wheat or malt or money, according to the market price thereof; and the sum of 100*l.* was then taken as a fine for the granting thereof. *Hocque, &c. Et obijcimus & articulamus de quolibet alio tempore valore vel summa, &c. Et ut supra.*

XLIII. *Item*. We article and object to you, the said Dr. *Richard Bentley*, that you have frequently, since your being Master of the said college, made, and caused several leases of estates belonging to the said college to be made and granted to several persons, wherein the price of corn hath been fixed at one certain set rate, for and during the whole term of such lease granted, and a covenant made with such persons, that they should pay their corn rent at one and the same rate and price during the whole term of



not reserved in corn, are declared void; and the corn so reserved is ordered to be applied to the use of the college, on pain of deprivation of the governor of the college, and all others consenting to any misapplication. — That Dr. Bentley, during all

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of such leases, as hereafter is mentioned, whereby the whole rent, payable for such estates, hath been reduced to one certain annual sum of money, notwithstanding that it was, at all such times, objected to by several of the Fellows then present, that such covenants and reservations of abatements, were contrary to the true intent and meaning of the statute, and a great diminution of the proper income of the college. *Hocque, &c. Et ut supra.*

XLIV. *Item*, We article and object to you, the said Dr. Richard Bentley, that you did, on or about the 28th day of October, 1701, make and grant a lease of a tenement, close, pasture and right of common in *Shallow*, in the county of *Lincoln*, part of the estate of the said college, for the term of twenty years, to *Charles Firebrass*, Esq; in which lease a third part of the rent payable for the same, is reserved to be paid in wheat; and did cause or procure a clause or covenant to be inserted in such lease, whereby it was agreed, that it shall and may be lawful for the said *Charles Firebrass* to defalk and abate, during the whole term of such lease, so much out of the proportion of rent to be paid in money, according to the market price of wheat, as the price of wheat should, on the market days next before such rent should become due and payable, exceed 4s. 8½d. per bushel; and that several leases of the same estate, with the same clauses and covenants therein inserted, have, since the surrender or expiration of the said former lease, been made and granted by your means and procurement to the said *Charles Firebrass*, Esq; and others. *Hocque, &c. Et obijcimus & articulamus de quolibet alio tempore vel summâ, &c. Et ut supra.*

XLV. *Item*, We article and object to you, the said Dr. Richard Bentley, that you did, on or about the 15th day of November, 1715, cause or procure a lease of the tythes of corn, belonging to the rectory of *Kirby Kendall* in *Westmoreland*, part of the estate of the said college, but bearing date at or about Christmas 1711, to be made and granted to *Josiah Lambert* for a term of twenty years, in which lease a third part of the rent payable for the said tythes is reserved to be paid in corn, viz. in fifteen quarters of wheat, and 107 quarters of malt; and that you the said Dr. Bentley did cause, or procure a covenant to be inserted in such lease, whereby it was and is agreed, that the said *Josiah Lambert* shall and may, during the whole term of such lease, defalk and abate out of the proportion of rent to be paid in money, according to the market price of corn on the market days next before such rent shall become due and payable, so much money as the price of wheat should exceed 1l. 13s. and half a farthing per quarter, and so much out of the price of malt as should exceed 12s. 4d. per quarter, whereby you reduced and set the price of wheat to 2s. 10½d. per bushel, and the price of malt to 1s. 6½d. per bushel, and not more. *Hocque, &c. Et obijcimus et articulamus de quibuscumque aliis tempore, valore & summâ. Et ut supra.*

XLVI. *Item*, We article and object to you, the said Dr. Richard Bentley, that you did, some time in the year 1724, cause, procure, or suffer the said last mentioned lease to be renewed and granted to the said *Josiah Lambert*, with the same covenants and conditions, and with the same powers of defalcation and abatement, as were granted by the



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all the time of his Mastership, had misbehaved himself, and violated the statutes, of which he (the Bishop) being informed, did, as a visitor of the college, and of Dr. Bentley as Master, issue such citation, and exhibit such articles as were mentioned in

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the said former lease, and a fine of 250*l.* was then had and taken as a consideration for the renewal thereof. *Hocque, &c. Et objicimus & articulamus de quolibet alio tempore vel summâ, &c. Et ut supra.*

XLVII. *Item*, We article and object to you, the said Dr. Richard Bentley, that on or about the 2d day of November, 1714, you did, for and in consideration of a fine of 380*l.* likewise cause or procure a lease to be made and granted to the said Josiah Lambert and others, of the rectory of Aisgarth in the county of York, also part of the estate of the said college, for the term of twenty years; and the third part of the rent payable by such lease for the same, is therein reserved to be paid in corn, viz. one quarter of wheat, and 212 quarters of malt; notwithstanding which, you the said Dr. Bentley did cause or procure a clause or covenant to be inserted in such lease, whereby it was and is agreed, that the said lessees shall and may, during the whole term of such lease, defalcate and abate out of the proportion of rent to be paid in money, according to the market price of corn on the market days next before such rent should become due and payable, so much money as the price of wheat should exceed 13*s.* 4*d.* the quarter, which is after the rate of 20*d.* per bushel, and not more; and as the price of malt should exceed 10*s.* per quarter, which is after the rate of 15*d.* the bushel, and not more. *Hocque, &c. Objicimus et articulamus de quibuslibet aliis tempore, pretio, valore vel summâ, &c. Et ut supra.*

XLVIII. *Item*, We further article and object to you, the said Dr. Richard Bentley, that by settling and ascertaining the price of corn at certain and fixed rates, in manner as in the preceding articles is mentioned, you have greatly wasted, impaired, and diminished the yearly revenues of the said college, and alienated so much of those revenues, as the common and ordinary market price of corn shall exceed the rates by you so set as aforesaid, and particularly by fixing the price of the corn rent for the leases of Kirby Kendal and Aisgarth, at the rates in the two next precedent articles mentioned, you have thereby lessened the yearly revenues of the said college to the amount or value of 160*l.* per ann. or thereabouts, and thereby violated the 35th of the said statutes of Queen Elizabeth, and incurred the horrid guilt of wilful perjury. *Et hoc fuit & est verum, &c. Et objicimus & articulamus de quâlibet aliâ summâ, &c. Et ut supra.*

XLIX. *Item*, We article and object to you, the said Dr. Richard Bentley, that on the 28th day of September, 1717, being the market day in Cambridge, on which the price of corn to be paid to the colleges for rent for the preceding half year was to be settled, you the said Dr. Bentley did order and cause your bailiff, John Kent, to bring from St. Ives a quarter, or some other quantity of wheat, into the market of Cambridge that day, and did likewise fraudulently invite and procure one Rule, a farmer, then living at Rampton in the county of Cambridge, to bring the same day into the said market a like parcel of wheat, and promised the said Rule, that the said wheat should be bought of him at the rate of 5*s.* the bushel; and you the said Dr. Bentley did oblige and compel one William Porter, the college butler, to buy, and the said William Porter did accordingly, on that day, buy of them the said Kent and Rule, for the use of the said college, all the wheat so by them brought into Cambridge market that day,



in the declaration. — That the crimes mentioned in those articles, were violations of the statutes within the statute *de magistri si res exigat amotione*, in the declaration set forth ; that the crimes in the 35th and following articles, were dilapidations of

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day, at the aforesaid price of 5s. the bushel, altho' the current and common price of the best wheat in the said market on that day was but 4s. 4d. and the best and highest price thereof was but 4s. 7d. and not more. *Hocque, &c. Et obijicimus & articulamus de quolibet alio tempore, pretio, valore vel summa, &c. Et ut supra.*

L. Item, We likewise article and object to you, the said Dr. Richard Bentley, that you did on the said 28th day of September, 1717, cause the said John Kent, your bailiff, to bring a load of malt into Cambridge, and carry it to the college brewhouse, without going into the market, and did oblige one Barant, the then college brewer, to take the same off his hands, and to take it at the rate or price of 1 l. 6 s. per quarter, altho' the highest price of malt sold in the said market that day, was but 1 l. 2 s. per quarter, and not more. *Hocque, &c. Et obijicimus & articulamus de quolibet alio pretio, &c. Et ut supra.*

LI. Item, We article and object to you, the said Dr. Richard Bentley, that you having, by the articles aforesaid, raised the price of wheat and malt so much above the real value as in the next preceding article is mentioned, did, soon after Michaelmas 1717, and before the Lady-day following, cause great quantities of your own tythe wheat and barley malted, to be sold at the college bake-house and brew-house, at the extravagant price of 40s. a quarter for wheat, and 26s. a quarter for malt, and did oblige all the college tenants to pay their wheat rent due for the preceding half year, according to such prices of 40s. a quarter, and did, in the succeeding years 1718 and 1719, oblige the college officers to take off about one hundred quarters of your own damaged malt, and great quantities of your own tythe wheat, at prices far exceeding the market price, upon the respective market days. *Hocque, &c. Et ut supra.*

LII. Item, We article and object to you, the said Dr. Richard Bentley, that you have frequently, since your being admitted Master of the said college, in breach of your said oath, and in violation of several of the statutes of the said college, unnecessarily and profusely wasted and expended several great and excessive sums of money, part of the common stock of the said college ; and particularly, in some few years after your being made Master of the said college, you did expend or lay out near upon the sum of 2,000 l. of the college stock, in altering, fitting up, beautifying and improving the lodge, belonging to you as Master, which was then in very good condition and repair, and in no need of any such reparations and improvements ; and since that time, and particularly since the year 1715 or 1716, you have, over and above the said sum of 2,000 l. exorbitantly and unnecessarily laid out and expended many other large sums of money out of the college stock, in making many other unnecessary and superfluous additional buildings thereto, and in other extravagances ; particularly, by causing a double vaulted cellar to be made or sunk in your back yard, for keeping your wine cool ; by ordering and causing your garden to be laid out and formed after a new model, and a terras to be erected therein by the water side ; by building a summer house, or room of entertainment in the garden, belonging to you as Master, and in that a bath, which you have caused to be supplied with water and other conveniencies for bathing ; by converting two edifices belonging to the college into a very large and spacious granary,



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of the goods of the college; that all dilapidations were excepted out of the general pardon; and that there was not in that act, any pardon of the violations of college statutes. — That Dr. Bentley did not endeavour to procure the consent of the eight

at the expence of 400*l.* or at least 300*l.* for your own private use, to carry on the trade or business of a farmer or malster, which you followed for some time; by seizing upon two pieces of ground belonging to the college, to keep a couple of cows in, for the use of yourself and family; and by hedging, ditching, and trenching the same for that purpose; by causing a new brick house to be built in the back side of the college, for wintering the said cows, and building three new coach-houses for the use of particular persons; all which were paid for out of the college stock, and amounted in the whole to the sum of 2000*l.* or some other such large sum of money, as by the accounts of the Burfars of the said college, reference being thereto had, will more fully appear. *Hocque, &c. Et obijcimus & articulamus de quâlibet aliâ summâ, &c. Et ut supra.*

LIII. *Item*, We article and object to you, the said Dr. Richard Bentley, that you have further and unnecessarily and profusely wasted and consumed great part of the common stock of the said college, by building, or causing a fine new country-house or seat to be built upon part of the college estate, at Over in the county of Cambridge, for the use of yourself and family, fit for the reception of a person of rank and quality; and have already expended therein, tho' not yet finished or furnished, more than 800*l.* of the college money. *Hocque, &c. Et obijcimus & articulamus de quâlibet aliâ summâ, &c. Et ut supra.*

LIV. *Item*, We article and object to you, the said Dr. Richard Bentley, that Dr. John Christopherson, formerly Master of the said college, in the reign of Queen Mary, did, by his last will and testament, give and bequeath all his hangings, bedsteads, tables, forms, chairs, wainscot, ceiling, and all the furniture belonging to his kitchen, to the said college, for the use of his successors, Masters of the said college for the time being; upon condition, that every successive Master should oblige himself in the sum of 200 marks, to leave the same in as good condition as he found them; as by the said will, now remaining among the muniments of the said college, reference being thereunto had, will appear. *Et ut supra.*

LV. *Item*, We article and object to you, the said Dr. Richard Bentley, that you, upon your becoming Master of the said college, found the lodge belonging to you as Master, well and sufficiently supplied with all necessary and useful furniture, fit and sufficient for a Master of the said college; all which came to the hands or possession of you the said Dr. Bentley. *Et hoc fuit & est verum, &c. Et ut supra.*

LVI. *Item*, We article and object to you, the said Dr. Richard Bentley, that notwithstanding the premises, and notwithstanding there is not any allowance made by the statutes to the Master of the college, for the furniture of his lodge; yet you, the said Dr. Bentley, have squandred away great and excessive sums of money out of the college stock, over and above those before mentioned, for finishing and furnishing the said lodge; and particularly, in setting up nine marble chimney-pieces, and furnishing the same with a scarlet cloth bed, and chairs and stools, a damask bed and quilt, two large looking glasses, a silk squab, japan and walnut-tree tables; and in buying a coach for the use of your wife and daughters, and several other goods for the use of your self and family, to the amount or value of 600*l.*, 500*l.* or at least 400*l.* sterling; all which charge was by you paid for, out of the common stock of the said college. *Hocque, &c. Et obijcimus & articulamus de quâlibet aliâ summâ, &c. Et ut supra.*



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eight seniors for punishing the officers, who were not punishable without such consent. — That no particular punishment was appointed by the statutes, for the crimes objected against Dr. Bentley, but deprivation; which could not be, till after conviction.

LVII. *Item*, We article and object to you, the said Dr. Richard Bentley, that notwithstanding there is not, by any of the statutes of the said college, any allowance made to the Master of the said college for the time being, for bread, beer, fuel, or any other provisions for himself and family at home; yet you the said Dr. Bentley have, for these twenty three years last past, yearly consumed and wasted great and excessive quantities of the common provisions and stores belonging to the college, and applied the same to the use of yourself and private family at home, to the amount of several hundred pounds *per ann.*; viz. in bread, meal and beer, to the amount of 150*l.* *per ann.* or upwards; and, at the last audit, the expence on that account amounted to 174*l.* in coals and other fuel, to the amount some years more than 100*l.* *per ann.* as by the college books of accounts, reference being thereto had, will appear. *Hocque, &c. Et obijcimus, & articulamur de quâlibet aliâ summâ, &c. Et ut suprâ.*

LVIII. *Item*, We article and object to you, the said Dr. Richard Bentley, that you have likewise, for these many years past, yearly spent and consumed several great sums of money out of the common stock of the said college, for linen and pewter, pretended to be used in your family at home, to the amount or value of 70*l.* 60*l.* or at least 50*l.* *per ann.* and particularly in the last year, to the amount of 90*l.* as by the college books of accounts, reference being thereunto had, will more fully appear. *Et obijcimus & articulamur de quâlibet aliâ summâ, &c. Et ut suprâ.*

LIX. *Item*, We article and object to you, the said Dr. Richard Bentley, that you did, sometime in or about the year 1719, fraudulently, unjustly, collusively, and unknown to the respective members of the said college, contract and agree with Mr. Serjeant Miller, late one of the Fellows of the said college, to procure and obtain an allowance of 453*l.* to be made to him the said Serjeant out of the college stock, over and above the sum of 100*l.* before to him in hand paid, under pretence of reimbursing him the said Serjeant, the charge it was pretended he had been at, in carrying on a prosecution against you, the said Dr. Bentley, before the Right Reverend father in God, John Moore, late Lord Bishop of Ely, since deceased, as Visitor of the said college, for several great and enormous crimes by you committed, in the execution of your place or office of Master of the said college; but in reality and truth, such contract or agreement relating to the payment or allowance of the said sum of 453*l.* was by you made with no other design, view, or intention, than to avoid the pursuit of justice, and to engage and oblige the said Serjeant to withdraw a certain petition, that had been presented to his late Majesty King George I. on behalf of several of the Fellows of the said college, in order to ascertain the visitatorial power; and which the said Serjeant had by the said Fellows been intrusted to prosecute. *Hocque, &c. Et obijcimus & articulamur de quâlibet alio tempore & de quâlibet aliâ summa, &c. Et ut suprâ.*

LX. *Item*, We article and object to you, the said Dr. Richard Bentley, that, in pursuance of such agreement, you did, on the 19th day of June, 1719, at a meeting of the senior Fellows of the said college, propose and insist to have the said sum of 453*l.* allowed and paid to the said Serjeant Miller, out of the common stock of the said college, upon the pretence in the next precedent article mentioned; and at the same time insisted, and peremptorily demanded, to have the sum of 500*l.* paid, or allowed to yourself out of the same



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viction before the Bishop of *Ely*; that the matters said in the declaration to be corporate acts, were really not so. — That before the prohibition, the 30th and 32d articles were amended upon Dr. *Bentley's* complaint. — That the Bishop, and not the King, was the general visitor of the college; and the plea concluded with praying the King's writ of consultation.

Dr.

same stock, to reimburse you the charges which you pretended you had been at in defending yourself against such prosecution, but that such proposal and demands were all rejected by a majority of the seniors then present; notwithstanding which, you the said Dr. *Richard Bentley* did, on or about the 5th of *December* following, by vile and indirect practices, in the absence of three of the eight senior Fellows of the college, and against the consent of three of those present, procure an order or conclusion to be made and passed by other Fellows of the college not of the seniority, nor deputed by any of the three absent seniors, to allow and pay out of the college stock, to the said *Serjeant*, the said sum of 453*l.* and to yourself the aforesaid sum of 500*l.* upon the several pretences before mentioned; and that the said sums of 453*l.* and 500*l.* were afterwards paid to the said *Serjeant Miller*, and to you the said Dr. *Bentley*, by virtue of such pretended order or conclusion, out of the common stock of the said college, to the great waste and diminution thereof, and to the great prejudice of the respective members of the said college. *Hocque, &c. Et obijcimus & articulamus de quibuscumque aliis tempore et summa. &c. Et ut supra.*

LXI. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that the said *Serjeant Miller*, in consideration of the said sum of 453*l.* so paid to him out of the college stock or treasury, as before set forth, did by a writing or instrument under his hand and seal, bearing date the 19th day of *December*, 1719, covenant and agree that he would not at any time after, prosecute or proceed upon the before mentioned petition to his said late Majesty, but would withdraw, or cause the same to be withdrawn, and do all other acts in his power towards the preventing or hindring any further prosecution thereupon, as by the said writing or instrument now in the college registry, reference being thereto had, will appear. And the said *Serjeant Miller* did never afterwards follow or prosecute the said petition, or do or cause any act to be done thereupon, and hath ever since refused, and doth still refuse to deliver up all such papers, writings, or instruments, as were intrusted in his hands, in order to carry on such prosecution. *Hocque, &c. Et obijcimus & articulamus de quolibet alio tempore, &c. Et ut supra.*

LXII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that notwithstanding you are by your oath, and by the 29th of the said statutes, obliged to preserve all the moveables of the college, and to take care that the senior Dean and junior Burfar do every year, within one month after their admission into their respective offices, make, or cause to be made, two perfect inventories of all the goods, moveables, plate, and other things belonging to the said college, one of such inventories to be repositied in the public treasury, and the other with the Vice-master for the time being; and, at the same time, to take an exact account of such goods, moveables, plate, &c. as shall be at that time missing, by comparing such inventories with those made in the preceding year: But for these ten years last past, and upwards, no such inventories have at any time been made, neither have you at any time called upon or required the senior Dean, and junior Burfar, or either of them, to perform their duty, according to the said statute; nor have you ever censured or punished them for their neglect therein, as by the statutes of the said college you are obliged, and ought to have done; by reason whereof, a considerable part of the college



Dr. *Bentley*, by replication, denied that the crimes alledged against him were violations of the statutes, within the second part of the statute *de magistri si res exigat amotione*; and that any of the crimes in the 35th and following articles, were dilapidations of the goods of the college, within the second part of the last mentioned statute: The Doctor then set forth the act of general pardon, 7th of *George I.* and insisted on the benefit thereof.

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To this replication the Bishop demurred; Dr. *Bentley* joined in demurrer; and after several arguments, the Court of King's Bench in *Trinity* term, 1731, were pleased to give judgment for Dr. *Bentley*, that the prohibition should stand.

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college plate hath been for several years last past, and is now missing out of the college treasury, and no examination or enquiry hath been made after it by you the said Dr. *Bentley*. *Hocque, &c. Et obijimus et articulamus de quâlibet aliâ quantitate, &c. Et ut supra.*

LXIII. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that by the 33d of the said statutes, it is (*inter alia*) ordained and provided, that the Bursars and Steward of the said college, for the time being, shall bring their respective accounts to be examined by the Master, or in his absence by the Vice-master, and the eight senior Fellows of the said college, at the end of every quarter; but that such accounts have not once, during the whole time that you have been Master of the said college, been brought in and examined, according to the directions and intent of the said statute. And when one of the seniors demanded and insisted to have the accounts examined quarterly, pursuant to the said statute, you the said Dr. *Bentley* replied with great disdain, "dont tell me of statutes." *Hocque, &c. Et ut supra.*

LXIV. *Item*, We article and object to you, the said Dr. *Richard Bentley*, that at the general audit of the accounts of the whole college, which is by the said last mentioned statute appointed to be on the 4th of *December* yearly, these accounts have, for many years past, been passed in gross only, without entering into any particulars, or examining vouchers for any of the sums said to be expended therein; and at several times, and more particularly in the year 1715, when one of the seniors at such meeting demanded, that the orders by which great sums of the college money had been paid and laid out, should be produced, and particulars of general sums specified, and the vouchers thereupon examined; you the said Dr. *Bentley*, with great insolence and foul language, hindered and prevented such examination; and by reason of your ill treatment and behaviour, no objection hath of late been made to the accounts concerning the extravagant sums laid out upon the lodge, garden and additional buildings, upon the aforesaid house at *Ower*, nor to an article of 400*l.* demanded for velvet and other materials said to be used in the chapel, nor no enquiry made after the college plate so as aforesaid embezzled, lost, or missing; nor after the great sums of money laid out and expended in bread, beer, coals and other fuel, linen, pewter, and other things, for the use of you the said Dr. *Bentley*, and your family, as in the precedent articles is mentioned.

LXV. *Item, Quod premissa, &c.*



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N. Fazakerley.

J. Harper.

Whereupon the Bishop brought a writ of error in Parliament to reverse this judgment; and on his behalf the general question was said to be, Whether, upon the whole matter, the Bishop appeared to have an authority to proceed upon the articles, or not. The 40th chapter of the statutes given by Queen *Elizabeth* to the college, intituled, *de magistri si res exigat amotione*, impowers the Bishop of *Ely*, as visitor, to proceed against the Master for the crimes therein mentioned, by the words *dilapidatio bonorum, et violatio statutorum collegii*; and the articles upon which the Bishop was proceeding, amounted plainly to a charge of those crimes, as would appear when the nature of the several facts, which made up the charge, was considered. But, upon the argument of this matter in the Court of King's Bench, several objections were made: I. That several of the matters charged in the articles were pardoned by the act of general pardon, 7 *Geo. I.* II. That many of the matters charged upon Dr. *Bentley*, being done by him in his corporate capacity, and in conjunction with others of the corporation, ought to be considered as corporate acts; and therefore to be punished only by the general visitor of the corporation, which was the King, and not the Bishop of *Ely*. III. That by the citation, the Doctor was to appear before the Bishop, as visitor of the Master, specially authorised and appointed by the 40th chapter of Queen *Elizabeth's* statutes; whereas it appeared by the defendant's plea, that a general visitatorial power had been before granted by King *Edward VI.* to the Bishop of *Ely*, and consequently, there being no part of the visitatorial power remaining in the crown for Queen *Elizabeth* to grant, her grant could not enure as an appointment of a special visitor of the Master, but it supposed the Bishop already to be visitor. — To the *first* of these objections it was answered, that the act of general pardon extended only to offences against the public laws of the kingdom, but not to offences against the private statutes of such particular societies as colleges are; and the Court of King's Bench were unanimously of this opinion. To the *second* it was said, that supposing the Bishop to be the special visitor of the Master only, yet, if Dr. *Bentley* had really concurred in corporate acts done against the statutes, he was certainly punishable for such concurrence, and the proper person to punish him was his visitor, whether that visitor was the visitor of those who concurred with



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with him or not: And this was likewise the unanimous opinion of the Court of King's Bench. To the *last* objection it was answered, that supposing the Bishop of *Ely* was first constituted visitor by the 46th statute of King *Edward VI.* yet the statutes of Queen *Elizabeth* being good, and the 40th of those statutes having in it words sufficient of themselves, without the statute of King *Edward*, to authorise him to proceed against the Master in a special manner; the Bishop might found such proceedings on which of those statutes he thought fit: And as to being special visitor of the Master only, the Bishop did not suppose himself so. But had the citation in question been defective, yet the appearance of Dr. *Bentley* upon it at the time and place appointed, would effectually have cured any mistake in the citation. And if the Bishop, in his visitatorial acts, had given a wrong account of the original of his jurisdiction, it was not apprehended, that any such error could prejudice him: Visitors not being tied up to any particular forms, nor to be prohibited for irregularities in their proceedings, or informalities in their acts, but only for want of jurisdiction. Now in the present case, it appeared upon the record, that the Bishop had a jurisdiction to proceed against the Doctor, and indeed the objection supposes it; if, therefore, this prohibition should be continued, it could not be for want of jurisdiction in the Bishop, but because the citation required the Doctor to appear before the Bishop under a wrong description of his authority; whereas it was apprehended, that the Bishop had no occasion to mention his authority at all; he needed not to have called himself visitor, it would have sufficed, that in fact he was so: And Dr. *Bentley*, having sworn to the observation of the statutes of the college, must have been presumed to know who was the visitor set over him by those statutes. For these reasons it was conceived, that the judgment given by the Court of King's Bench was erroneous, and ought to be reversed.

On the other side it was said, that this was a mere question of law arising upon the pleadings; for the Court of King's Bench founded their opinion upon a repugnancy, or inconsistency between the citation issued by the Bishop against Dr. *Bentley*, and the plea put in by the Bishop to justify his proceedings; and it was apprehended to be very plain, that the Bishop's plea was inconsistent with, and a departure from, his citation. For the Bishop, in his citation, summoned Dr.

P. Yorke.

T. Reeve.

W. Greaves.



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*Bentley* before him as a particular visitor, specially authorised and appointed by the 40th chapter of the statutes of *Queen Elizabeth*, to examine the Master of the college for certain crimes or enormities mentioned or expressed in the second member of that chapter; and yet in his plea he insisted, that the statutes of King *Edward VI.* were in force, and that by the 46th of those statutes, the Bishop of *Ely*, for the time being, was appointed general visitor of this college; but if he really was so, he could not be visitor specially authorised by *Queen Elizabeth* to examine the master, because the whole visitatorial power would have been in him under King *Edward's* statutes; and it was both repugnant and inconsistent, that *Queen Elizabeth* could grant to him a part of that power, the whole of which he was possessed of before; unless it be true, that the whole doth not contain, or is not equal to all the parts. Whether he really was general visitor or not, was not properly now in question; but it must necessarily be so taken upon this record as against the Bishop himself, he having pleaded that he was general visitor by King *Edward's* statutes; which, if he had not pleaded and set forth on record, the only question would have been, whether the articles which he had admitted, were within his enquiry as special visitor, by the 40th chapter of *Queen Elizabeth's* statutes, since he had cited *Dr. Bentley* as such; but by his plea, he insisted on a different power from that upon which he instituted or issued the citation, and a power totally inconsistent with it. That in cases of prohibition, both parties are in the nature of plaintiffs, or actors; and therefore, if the plea does not support the same kind of jurisdiction which is relied upon by the Bishop in his citation, that citation and all proceedings upon it will be illegal, and a consultation ought to go; for the defendant cannot have a consultation to enable him to proceed on that citation, without entitling himself to it by his plea, which the Bishop had not done in this case, but had insisted on another jurisdiction, different from that upon which his citation was founded. That this citation was the leading process and sole basis of all the subsequent proceedings below, and if it was not shewn by the Bishop's plea to have been warranted by a legal authority in its first issuing, whatever was done pursuant to it, was without jurisdiction; And whatever visitatorial power the Bishop of *Ely* might be entitled to, which was a distinct question, yet,

if



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if by his own plea, he had destroyed that jurisdiction under which the citation was grounded, the Court of King's Bench could no more suffer him to act under such a power, than if he had none at all. That the citation was likewise ill founded, because the Bishop of *Ely* was not appointed visitor by the 40th chapter of Queen *Elizabeth's* statutes, there being no words of creation or constitution in that chapter; for the first branch of it refers to the power to be exercised by the Vice-master and seniors, of admonishing the Master upon any neglect in the execution of his duty; and the next branch of it provides, that in case such admonition proves ineffectual, they should then lay the matter before the visitor, the Bishop of *Ely* for the time being; but these words could not possibly confer any original or new power, and if the Bishop had not a visitatorial power given him by this statute, whatever power of visitation he might otherwise have, the citation being wholly founded on this statute was illegally issued: And therefore the judgment of the Court of King's Bench was clearly right, and ought to be affirmed with costs.

AFTER hearing counsel upon this writ of error on *fifteen* several days, and discussing the matters of the charge, article by article; and after hearing the Judges upon the two following questions; I. "Supposing an action upon a prohibition brought in the Court of Common Pleas, and the plaintiff obtains a judgment for the prohibition to stand, and costs taxed for him, and a writ of error be brought in the Court of King's Bench, which Court reverses the judgment in part, and affirms it as to the rest; whether the plaintiff in that case is entitled to costs?" And II. "Whether, in the case in the question before stated, wherein the judgment is reversed in part, and affirmed in part, the costs are to be reduced, or the whole to stand?" And after great debate upon almost every part of the case, the entire order and judgment of the House was expressed in the following words:

JUDGMENT  
reversed in  
part.  
Jour. vol. 24.  
p. 116. 124.  
128. 129.  
171. 172.  
174. 175.  
177. 179.  
180. 182.  
183. 186.

"WHEREAS, by virtue of his Majesty's writ of error, returnable into the House of Lords in Parliament assembled, a record of the Court of King's Bench was brought into this High Court, the 11th day of *February* in the year of our Lord 1731, with the transcript thereof, wherein *Thomas*, Lord Bishop of *Ely*, is plaintiff, and *Richard Bentley*, Doc-  
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tor in Divinity, Master of *Trinity* college in *Cambridge*,  
 defendant, in order to reverse a judgment given in the said  
 Court of King's Bench, in an action upon a prohibition,  
 in which the said Dr. *Bentley*, who sued as well upon his  
 own as upon the King's account, was plaintiff, and the said  
 Lord Bishop of *Ely* defendant, upon which said writ, errors  
 being assigned by the said Bishop of *Ely*, and issue joined  
 by the said Dr. *Bentley*, and counsel on both sides having  
 been heard several days, as well in the last, as in this present  
 Session of Parliament, and the Judges having delivered their  
 opinions in relation to matters of law to them proposed;  
 and due consideration and debate having been had, of what  
 was offered on either side in this case: It is ORDERED and  
 ADJUDGED by the Lords Spiritual and Temporal in Parlia-  
 ment assembled, that the said judgment given in the Court  
 of King's Bench, in an action upon a prohibition, be, and  
 the same is hereby reversed: And it is hereby further ORDER-  
 ED and ADJUDGED, that a consultation be and is hereby  
 granted with respect to the 6th article, except as to these  
 words in the latter part thereof, *viz.* [and suffered or per-  
 mitted the officers of the said college in like manner to neglect  
 the same,] touching which words, the prohibition is to stand;  
 and that a consultation be also granted with respect to the  
 10th, 11th, 12th, 13th, 27th, 28th, 29th, 30th, 38th, 39th,  
 40th, 41st, 52d, 53d, 57th, 58th, 59th, 60th and 61st arti-  
 cles: But as to the 5th, 7th, 8th, 9th, 14th, 15th, 16th,  
 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 31st,  
 32d, 33d, 34th, 35th, 36th, 37th, 42d, 43d, 44th, 45th, 46th,  
 47th, 48th, 49th, 50th, 51st, 54th, 55th, 56th, 62d, 63d  
 and 64th articles, it is hereby further ORDERED and AD-  
 JUDGED, that the prohibition do stand as to those articles:  
 And it is hereby further ORDERED, that the plaintiff in error  
 do pay, or cause to be paid to the defendant in error, the sum  
 of 100*l.* for his costs." \*

\* This spirited prosecution was accordingly carried on, and after a trial at *Ely-House*, which lasted six and twenty days, sentence was, on the 27th of *April*, 1734, given against the Doctor, "That he had been legally convicted before the visitor, of a violation of the statutes, and dilapidation of the goods of the college; and that he had thereby incurred the penalty of deprivation of his office of Master." *Ely Register*, D. p. 328.

The curious reader will find the subsequent history of this business, in that elaborate work, *Biographia Britannica*, vol. II. 2d edit. p. 238.



*Thomas Acherley*, — — — Appellant. Case 6.

*Ann Acherley*, Widow, — — — Respondent.

21st February, 1732.

**RICHARD Acherley**, the respondent's husband, in consideration of a marriage to be had between them, and of 100*l.* paid to him as part of the respondent's marriage portion, and also of a settlement to be made by *Arthur Manwaring*, the respondent's father, of a farm and lands in *Nonnelly* in the county of *Salop*, of the value of 40*l.* per ann.; by indentures of lease and release, dated the 17th and 18th of July, 1689, conveyed a farm and lands in *Wolverley*, in the said county of *Salop*, of 60*l.* per ann. to the use of himself for life, with remainder to the respondent for life, for her jointure and in full satisfaction of dower. — And by another settlement of the same date, the said *Arthur Manwaring*, in consideration of the marriage, conveyed the said farm and lands in *Nonnelly*, to the use of *Richard Acherley* and the respondent, and to the survivor of them for life; remainder to the issue of that marriage, with remainder to *Richard Acherley* in fee.

The marriage took effect; and soon after *Arthur Manwaring* died, leaving *Mary Manwaring*, the respondent's mother, his widow; who being left in good circumstances, was applied to by one *William Vaughan* to advance him 700*l.* upon a mortgage of a copyhold estate in the manor of *Loppington*, in the said county of *Salop*.

After the security was approved of, she agreed to lend the money; but being at that time aged and infirm, and the manor lying at a considerable distance from the place of her abode, so that she was unable to travel thither to take an admittance to the estate, and reposing a great confidence in *Richard Acherley*, her son in law; she therefore entrusted him with the payment of the money, and agreed that he should take



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take a surrender of the said copyhold estate to himself, but in trust for her.

Accordingly *William Vaughan*, at a court held on the 12th of December, 1699, surrendered the said farm and lands in *Loppington*, to *Richard Acherley* and his heirs, subject to redemption. And by deed poll, dated the 14th of the same month, *Richard Acherley* declared, that the estate so surrendered, was in trust for *Mary Manwaring*, and that the 700*l.* was her proper money; and covenanted, that he and his heirs would surrender the said premises to the said *Mary Manwaring* and her heirs, and that all the interest of the said 700*l.* should be to her use.

*William Vaughan* having surrendered the equity of redemption of this copyhold estate to *Sarah* his wife, she, some time after his death, proposed to sell the same; and there being a considerable arrear of interest due on the said mortgage, an agreement was made by *Richard Acherley* with *Sarah Vaughan*, for the absolute purchase of such equity of redemption for 300*l.* and Mrs. *Manwaring* still continuing infirm and unable to travel, *Sarah Vaughan*, at a court held on the 10th of May, 1704, surrendered the said premises to the said *Richard Acherley* and his heirs. And upon payment of the purchase money, he took a release in the words following, viz. “ Know all men by these  
 “ presents, that I *Sarah Vaughan* of *Aston*, in the parish of  
 “ *Wem* in the county of *Salop*, widow, do hereby acknowledge  
 “ to have had and received of and from *Richard Acherley* of  
 “ *Shiffnall*, in the said county of *Salop*, Gent. the full and just  
 “ sum of 1,000*l.* of lawful *English* money, being the full con-  
 “ sideration of the purchase of a certain copyhold estate, lying  
 “ and being in *Loppington*, in the said county of *Salop*, by me  
 “ lately sold to the said *Richard Acherley*; of and from which  
 “ said sum, and of and from all other debts, accounts, reckon-  
 “ ings, sum and sums of money, dues and demands whatso-  
 “ ever, I do hereby for myself, my heirs, executors and  
 “ administrators, fully, clearly and absolutely release, acquit  
 “ and discharge the said *Richard Acherley*, his heirs, executors  
 “ and administrators, and every of them for ever, by these  
 “ presents.



“ presents. In witness whereof I have hereunto put my  
“ hand and seal this 17th day of *June* in the third year of the  
“ reign of our sovereign Lady *Anne*, by the grace of God,  
“ Queen of *England*, &c. Annoque Dom. 1704.”

On the 10th of *August* following, *Mary Manwaring* died intestate, leaving the respondent her only child, who soon afterwards obtained letters of administration of her personal estate; by virtue whereof *Richard Acherley* her husband, in her right, became well entitled to the real and personal estate of *Mary Manwaring*, which was of considerable value.

*Richard Acherley* and the respondent his wife, having received a considerable accession of fortune by the death of Mrs. *Manwaring*, and having been married several years without having any children, the respondent was desirous, that in case she should have no issue by her husband, she might have the liberty of disposing of 1,000*l.* at her death, to which he consented; and accordingly by an indenture dated the 20th of *February*, 1704, reciting this agreement, and the circumstances under which it was made, *Richard Acherley* and the respondent agreed to levy a fine of the said farm in *Nonnelly*, to the use of the respondent for life; remainder to trustees for 200 years, from the death of the survivor of them, in trust to raise any sum not exceeding 1,000*l.* and pay the same pursuant to the directions of the respondent, by her will or deed; with remainder to *Richard Acherley* in fee.

In *August*, 1723, *Richard Acherley* died intestate and without issue, leaving the appellant his brother and heir, and the respondent his widow; whereupon administration of his personal estate was granted to her.

The respondent being entitled to the copyhold estate at *Loppington*, as heir to Mrs. *Manwaring* her mother, the same having been, as she conceived, purchased in trust for her by *Richard Acherley*, she, upon the death of her husband, entered into possession of it: But the appellant having the legal title by descent from his brother, tho' in trust for the respondent, thought fit, in *Trinity* term, 1728, to bring an ejectment



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against the respondent's tenant, to recover the possession. Whereupon in *Michaelmas* term following, the respondent exhibited her bill in the Court of Exchequer, against the appellant; insisting upon the surrender to *Richard Acherley* in *December*, 1699, and the deed poll declaring the trust thereof, and also the surrender in *May*, 1704, and that both those surrenders were made in trust for Mrs. *Manwaring* her mother, and that she being her heir at law, was entitled to the estate; and therefore prayed an injunction to stay the appellant's proceedings at law, and to be quieted in the possession.

The appellant, by his answer, admitted the surrenders and the declaration of trust, but insisted, that previous to the indenture of the 20th of *February*, 1704, there was an agreement between *Richard Acherley* and the respondent, that he should enjoy the said copyhold premises and the 700*l.* secured to *Mary Manwaring*, discharged of all trust and claim whatsoever of the respondent, in consideration of his agreeing to give her power to dispose of the 1,000*l.*; and that, in pursuance of such agreement, the said indenture was executed; he insisted also on a custom of the manor, that if any person claiming any trust in any copyhold inheritance in the said manor, did not claim the same in a copyhold court of the manor, and pray that such claim might be entered in one, two, or three years after the right accrued, the right or trust of such person was barred, by virtue of the custom which operated by way of non-claim. And further, that *Richard Acherley* had purchased the equity of redemption with his own money, and had never declared any trust thereof.

In *Hilary* term following, the appellant exhibited his cross bill against the respondent, insisting on the said agreement, and also upon the said custom, as to the forfeiture of trust estates within the said manor; and prayed a discovery of the agreement, and such relief as might enable him to maintain his ejectment, to recover the possession of the said premises, and the rents and profits thereof received by the respondent.

After the appellant had answered the original bill, an injunction to stay his proceedings at law, which had been obtained by



by the respondent for want of an answer, was continued, on hearing of counsel on both sides upon the merits.

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The respondent soon afterwards put in her answer to the cross bill, and thereby denied, that there was any agreement between her and the said *Richard Acherley* her husband, that he should enjoy the copyhold premises and the 700*l.* discharged of all trusts or claims of the respondent; she also denied the pretended custom, and insisted that *Richard Acherley* purchased the equity of redemption with the money of Mrs. *Manwaring*, and that the purchase was made in trust for her, and that the release from *Sarah Vaughan* was a strong evidence of such trust.

On the 19th of *February*, 1730, both causes were heard; when the court were pleased to declare, that the appellant, as brother and heir of *Richard Acherley*, was a trustee in the second surrender for the respondent; and therefore decreed, that he should surrender to the respondent the copyhold estate at her expence, and that a perpetual injunction should be awarded, to stay the appellant's proceedings at law, and that the appellant's cross bill should be dismissed with costs, both at law and in that court.

Soon after pronouncing this decree, the appellant applied by petition for a rehearing, and obtained an order for that purpose; but he neglecting to draw up the order in a reasonable time, the respondent upon motion got it discharged.

The appellant therefore appealed from the decree *in toto*; and on his behalf it was urged, that by the statute of frauds and perjuries, it is expressly enacted, *that all declarations or creations of trusts of lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect*: Now it was admitted by the respondent, that no writing was ever signed by *Richard Acherley* her husband, to declare any trust concerning the second surrender; and yet the Court were pleased to declare, that the appellant was a trustee in the second surrender for the respondent: But it was apprehended, that in

J. Willes.  
W. Peere  
Williams.

cases



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cases where there was no proof by writing, there was no ground for the Court to declare a trust for any person to be good, which the statute had declared should be void. That the mortgage for 700*l.* was considered, both in law and equity, as a personal estate, which should go to executors and administrators, and the right of redemption was to be considered as the surplus of the land which remained unsold, and as an inheritance that went to the heirs and assigns; this right *Sarah Vaughan* had, and might sell to any person, and having accordingly sold it to *Richard Acherley*, the second surrender from her to him was a fair sale, subject only to the mortgage for 700*l.*; and as he might have redeemed on payment of that sum, so might Mrs. *Manwaring* have foreclosed for the non-payment of it. That the intention of the parties was fully expressed in the agreement of the 20th of *February*, 1704; viz. that *Richard Acherley* should on his part have and enjoy the 700*l.* as Mrs. *Manwaring's* personal estate; and that he, in consideration thereof, should give the respondent, his wife, a power of charging his farm in *Nonnelly* with 1000*l.* But by the present decree, this intention was wholly frustrated, for Mrs. *Manwaring* had no personal estate besides the 700*l.* and therefore, if *Richard* and his heirs were not to have the mortgaged estate, he had no consideration for the 1000*l.* charged on his farm in *Nonnelly*; and yet the respondent insisted upon and claimed by virtue of that agreement. That declarations of trusts as to lands, are questions of fact, properly triable by a jury at common law; and the appellant accordingly had, by his counsel, prayed an issue at law to try the question, Whether *Richard Acherley* did ever declare any trust concerning the second surrender, or any trust at all, except for the 700*l.* but this issue was denied, and a perpetual injunction awarded to prevent all trials: It was therefore prayed, that the decree in the original cause might be reversed, and the bill dismissed; and that the decree of dismissal in the cross cause, might also be reversed; and that the respondent might be decreed to account for the rents and profits from her husband's death, and to deliver up the writings to the appellant, and pay him his costs in both causes.

P. Yorke.

R. Wilbraham.

On the other side, it was said to be admitted, that *Richard Acherley* was a trustee for Mrs. *Manwaring* as to the mortgage made



made by the first surrender, he having expressly declared the same by his deed-poll; and as that surrender was in fee, and declared to be in trust for Mrs. *Manwaring* and her heirs, there was no occasion for a new declaration of trust upon the surrender of the equity of redemption; and she, very probably, entrusted *Richard Acherley* in this purchase, by reason of the confidence she reposed in him as being her son-in-law, and of her inability to travel to take an admittance in person. That by the release which was taken by *Richard Acherley*, upon the surrender of the equity of redemption, it appeared, that the consideration of the mortgage and purchase of the equity were consolidated together, which was an implicit acknowledgment that both came from the same hand; and as the consideration of the mortgage was indisputably the money of Mrs. *Manwaring*, there was the strongest presumption imaginable to suppose, that the consideration of the equity of redemption was likewise her money; there being no pretence that a distinct sum of 1000*l.* was paid for the purchase in 1704. That there was not the least colour of evidence from the recitals in the deed of *February*, 1704, or from the proofs in the cause, that the power given to the respondent of charging 1000*l.* was in lieu of her pretensions to the copyhold estate, or to discharge it from the trust of the mortgage; but it was only intended by *Richard* to gratify the request of his wife, in whose right he had just before received a considerable accession of fortune, by giving her a power, in case she had no issue, to dispose of some part of it as she thought proper: as therefore the appellant had no pretence of title to the copyhold premises, at least till the mortgage was discharged, it was conceived to be a notorious violation of the rules of equity, for him to take advantage of his legal title as trustee, and make use of it against his *cestui que trust*, to turn her out of possession by ejectment, and thereby put her under the absolute necessity of exhibiting a bill in equity to protect her possession by an injunction. But further, the appellant did not by his cross-bill, set up a title to the equity of redemption only of this copyhold estate, and pray to be admitted to redeem; but he set up an absolute title to the whole inheritance, upon an imaginary agreement and custom, which had no manner of foundation either in law or in fact. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.



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DECREE  
affirmed,  
Jour. vol. 24.  
p. 191.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 7. *Randall*, Lord Baron of *Dunsany*, in } Appellant.  
*Ireland*, - - -

*Thomas Shaw*, Esq; - - Respondent.

7th March, 1732.

**E**DWARD *Plunket*, the appellant's father, soon after the Restoration, viz. in 1663, exhibited his claim before the Commissioners appointed to put in execution the acts of *settlement* and *explanation* in *Ireland*; thereby praying to be decreed, *inter alia*, to the towns and lands of *Kentstown*, *Veldenstown*, alias *Peldenstown*, *Curraghstown*, and *Erick*, alias *Knockirk*, alias *Knockburly*, with their appurtenances in the barony of *Duleck* and county of *Meath*, part of the antient estate of the *Dunsany* family: And on hearing this claim on the 21st of *August*, 1663, it was adjudged and decreed, that the said *Edward Plunket* was an innocent papist, within the true intent and meaning of the said acts, and that he and his heirs should be restored to the said estate.

*William Shaw*, the respondent's grandfather, was chief agent and manager for *Patrick Lord Dunsany*, and the said *Edward Plunket* his son, in all their affairs, and particularly in prosecuting and carrying on the said claim, and in obtaining the said decree of innocence, and also in procuring a clause in the act of *settlement*; whereby, after reciting that the said *Patrick Lord Dunsany*, and some other noblemen and gentlemen therein particularly named, had, for reasons known to his Majesty, in an especial manner merited his Royal grace and favour; it was declared, that every of them should, without being put to any further proof, be restored to their former estates, according to the rules and directions in the said act for that purpose specified;



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cified; and afterwards in procuring a further clause in the act of *explanation*, by which it was enacted, amongst other things, that forthwith, and without any previous reprisals, the said Lord *Patrick* and his heirs should be restored to the possession of his principal and capital seat, and also one third part of all other his estate, of what kind or nature soever, of which he, or any other person to his use, or in trust for him, were seised or possessed of upon the 22d of *October*, 1641; and that, with all convenient speed, the whole residue thereof should be restored to him and his heirs; the respective adventurers or soldiers, or their heirs, then in possession thereof, or claiming the same, being first satisfied, their respective shares and proportions due to them by the said act.

The said *Edward Plunket* and *Catherine* his wife, together with *Christopher Plunket* then their eldest son and heir-apparent, and the said *Patrick Lord Dunsany*, by indenture dated the 18th of *November*, 1663, mortgaged the said premises to the said *William Shaw* for 999 years, at the rent of 20*s.* *per ann.* subject to the following condition or proviso of redemption; *viz.* “ that  
“ whensoever the said *Patrick*, Lord Baron of *Dunsany*, *Edward Plunket*, *Catherine Plunket*, and *Christopher Plunket*, or  
“ any of them, their or any of their heirs or assigns, should  
“ pay or cause to be paid to the said *William Shaw*, his executors, administrators, or assigns, the just and full sum of  
“ 1200*l.* sterling, in one entire payment; that then, and from  
“ thenceforth, the said indenture of demise, and the said  
“ estate and term thereby granted, should be utterly void,  
“ frustrate, and of no effect; and that then, and from thenceforth, it should and might be lawful to and for the said  
“ *Edward Plunket*, his heirs or assigns, into all and singular  
“ the said demised premises, and every part thereof, to reenter, and the same to have again, repossess and enjoy, as  
“ in his or their first or former estate; any thing in the said  
“ deed contained to the contrary notwithstanding.” To which indenture the said *William Shaw* was a perfecting party; and by virtue thereof entered upon and became possessed of the premises.

*Edward Plunket* died in 1665, leaving issue the said *Christopher*, afterwards Lord *Dunsany*, and the appellant; and Lord  
*Christopher*



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*Christopher* dying some time after, without issue, the appellant became entitled to the equity of redemption of the premises.

In 1686, the appellant filed a bill in the Court of Chancery in *Ireland*, against the said *William Shaw*, for a redemption, and an account of the profits of the said premises; which bill *Shaw* answered, and soon afterwards left *Ireland*, but never returned again.

In 1692, or 1693, *William Shaw* junior, son of the said *William Shaw*, went into *Ireland*; and he and his father being sensible they had no right to the premises, but under the said mortgage; *William Shaw* junior, by his father's directions, proposed to give up the possession to the appellant, upon his paying the said sum of 1200*l.* and confirming the leases which had been made by *William Shaw* senior; which proposal the appellant did not come into, thinking it unreasonable; but *William Shaw* senior, continued from time to time to make fresh proposals to the appellant for ending their differences amicably, and thereby hindered him from bringing the said cause to a hearing.

*William Shaw* senior died in 1706, before the dispute could be settled by any agreement, leaving the said *William Shaw* junior, his son and heir, who took out administration to his father with his will annexed.

*William Shaw* junior died intestate in 1710; leaving issue the respondent and his mother *Hester*, who took upon her to be his guardian; and having taken out administration *de bonis non*, with the will annexed of *William Shaw* senior, entered into, and became possessed of, the said premises, and received the rents, issues, and profits thereof.

On the 12th of *April*, 1722, the appellant filed his bill in the said Court of Chancery against the respondent, and *Hester* his mother; praying an account and redemption of the premises. And, on the 28th of *September*, 1723, the respondent put in his answer and plea to the said bill. By his answer he set forth, that the appellant's father exhibited such claim, and was thereupon decreed innocent, and to be restored to the lands as in the bill mentioned, and admitted the mortgage from the appellant's



pellant's father to the said *William Shaw*; but insisted, that the said lands and premisses were seized and sequestered on account of the rebellion which broke out in *Ireland* in 1641, and were vested in the Crown by the act of *settlement*; and that King *Charles II.* by his letters patent, dated the 17th of *July*, in the 19th year of his reign, granted the premisses to the said *William Shaw*; and that he held the same under that title, without regard to the said mortgage, and never had or applied for any reprisals or satisfaction for the said lands, or his right therein, as a soldier: And that being so in possession, he, by deed dated the 7th of *June*, 1690, settled the said lands on *William Shaw* junior, his eldest son, in consideration of 500*l.* as a marriage portion, and of a marriage before had and solemnized, and pursuant to an agreement before marriage: And as to such part of the bill as sought relief and redemption, and required him to convey his estate therein to the appellant, and to give him up the possession, and to account with him for the profits, and to set forth the value of the premisses; he pleaded and insisted on the said letters patent from King *Charles II.* to the said *William Shaw* senior, without any saving to any person whatsoever, except the said Lord *Patrick*, his heirs and assigns, and that there had been no reprisals set out in lieu; and he also pleaded an act of Parliament made 10th *William III.* intituled, *An act for confirming estates and possessions held and enjoyed under the acts of settlement and explanation*; and the aforesaid deed of settlement, and the length of time.

This plea was argued on the 7th of *December*, 1723; when the Lord Chancellor of *Ireland* was pleased to order the same to be allowed, with costs.

To this order the appellant submitted, and so long afterwards as the 15th of *February*, 1724, he filed a replication to the respondent's plea; but never thought proper to proceed further in the cause till the year 1731, when he brought the present appeal.

In support of which it was argued, that *Edward Plunket* had a decree of innocence pronounced for him, and his claim allowed, and possession ordered to be delivered to him, several years before *William Shaw* passed the patent. That there could

T. Lutwyche.  
W. Hamilton.



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be no stronger acknowledgment, or any clearer evidence of the appellant's title to the lands in question, than *Shaw's* own acceptance of a mortgage under it; especially when, by the respondent's own admission, he appeared to be an agent employed by the family in their affairs. That though *Shaw*, by suing out the patent in his own name, endeavoured to defeat this title, yet it was apprehended, that no estate thereby passed to him in the premises, or could be divested out of the appellant's father, because he was decreed *innocent*; and because, by the express words of the act of *settlement*, it was provided, "that nothing therein contained should vest, or be understood to vest in the Crown, any lands, tenements, or hereditaments, of any innocent papist, or their innocent heirs." That the mortgage being indefinite in its first creation, and the term being for 999 years at 20*s.* annual rent, and redeemable at any time on payment of 1200*l.* no subsequent settlement or other disposition could discharge it from the condition it was originally made subject to, without the act or concurrence of the mortgagor; nor consequently preclude his title of re-entry and redemption upon performing that condition; and therefore the length of time ought not to be any plea or bar in this case. And as this mortgage was only a chattel real, and not capable of being intailed, it was conceived the respondent could derive no sort of interest to it under the settlement alledged to have been made upon his mother's marriage; he had not therefore, upon his own shewing, the least colour for protecting himself by his plea as a purchaser for a valuable consideration. That there was plainly notice at the time of the settlement; for it was not in the least denied that *Shaw* the father, who was privy to the whole affair, had notice; and more particularly of the mortgage, to which he was a perfecting party; and if the father, who was a party to the settlement, had notice, that would be no notice to the son, and the rest claiming under the settlement. That if the appellant's father had not claimed and been decreed to the estate, yet the title of Lord *Patrick* being particularly provided for by the clauses inserted in his favour in the acts of *settlement* and *explanation*, the appellant would be entitled to be relieved as his heir at law; especially when it was considered, that *Shaw*, by accepting the mortgage and thereby attorning to the appellant's ancestor,



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ancestor, either admitted, or at least waived the benefit of reprisals; for if he had not, Lord *Patrick* was absolutely entitled to one third part of his estate without any reprisals whatever; and which, for ought that could appear to the contrary before the hearing of the cause, might comprehend the very lands in question. Besides, the profits received by *Shaw* in his life-time under the mortgage, would appear to exceed in value any reprisals he might otherwise have pretended to. Neither was the statute relied upon by the plea, any bar to the appellant's demands, as it extended only to those cases where the decree of innocence left the party afterwards to take his remedy at law; and not to any case where the person decreed innocent was, in consequence of such decree, restored to his estate and the actual enjoyment of it; and this plainly appeared to have been the case of the appellant's ancestors, as there could not be a more effectual acknowledgement of the right from any tenant in possession, than what, in the present case, the acceptance of a mortgage amounted to. Lastly, that the respondent had over-rated his plea by his answer, he having first answered the bill to which he pleaded, which was contrary to the rules of a Court of Equity; the same ought not therefore to have been allowed as a plea, but at most ought only to have stood for an answer, and the benefit of it reserved to the hearing.

On the other side it was contended, that the respondent appeared to be a purchaser of the premises for a valuable consideration, under the marriage settlement of *June*, 1690, without any notice of the title now insisted on by the appellant, either to the respondent's father or mother, or any other person, whereby his right to the premises could be affected; which was a full bar to the appellant's having any relief against the respondent in a Court of Equity. But if such bar did not stand in the appellant's way, yet he appeared to have no right to a redemption of the premises, by reason of Lord *Patrick* or *Edward Plunket's* not having granted any reprisals according to the terms of the act of *explanation*; and also by reason of the act of the 10th of *William III.* and of the length of time and continued possession against his title for above 70 years. That the appellant, by replying to the plea, so long ago as *February*, 1724, had submitted to the order for

P. Yorke.  
C. Talbot.

allowing



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allowing it, and had only put the truth of the facts therein contained in issue; he ought therefore to have proceeded to examine witnesses to falsify the plea, and to prove such notice of his pretended equity previous to the settlement, as might affect the respondent's title. And if the plea had never been argued, yet the appellant, by replying to it, had admitted it to be a good bar to the relief sought by the bill; if the facts alledged therein and in the respondent's answer were true. It was therefore prayed, that the order for allowing the plea might be affirmed.

ORDER  
affirmed,  
Jour. vol. 24.  
P. 205.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Case 8. *Lawrence Cotter, Esq;* - - Appellant.

The Right Honourable *James, Earl of* }  
*Barrymore,* - - - Respondent.

3d April, 1733.

**R**ICHARD, Earl of *Barrymore*, being seised in fee of the lands of *Ballyvillowne*, alias *Cove*, *Liffinesky*, *Tyneglassy*, and *Bane Collig*, in the county of *Cork*, by indenture dated the 18th of *November*, 1652, demised the same, being then only of the yearly value of 20*l.* to *Nicholas Astwood*, for the term of 151 years, in consideration of a fine of 160*l.* and of a reserved rent of 12*l.* 10*s.* But, as the premises were held either in jointure or dower by *Alice*, Countess Dowager of *Barrymore*, care was taken to provide that this lease should not commence till her decease, which did not happen until fifteen years afterwards; and his Lordship, at the same time, also executed a penal bond for 320*l.* to *Astwood*, conditioned for performance of the covenants on his part contained in the lease.

By deed dated the 28th of *April*, 1656, Mr. *Astwood* assigned all his interest in the lease to *Edmund Cotter, Esq;* the appellant's



appellant's grandfather, for 160*l.*; who, in the year 1660, died, having, by his last will, devised his said reversionary term, when the same should fall into possession, to his two sons, *Garret Cotter* and *James*, afterwards Sir *James Cotter*, the appellant's father, equally between them; and if either of them should die before he had lawful issue, then his part was to go to the survivor.

1732.

The Countess Dowager dying in the year 1667, and Sir *James Cotter* being then in *England*, his brother and co-devisee, on their joint behalf, entered upon the premises, which they held afterwards as joint tenants or tenants in common, till the whole at last came to vest absolutely in Sir *James*; who continued in the sole enjoyment of the lands, under the said lease and rent, without any interruption, other than that, in the year 1690, one *George Gamble* got into possession, under a covenant of lease, which the Earl had taken upon himself to make of the premises; but which being soon after given up as a void lease, Sir *James* was again restored, and enjoyed the lands during the remainder of his life.

Sir *James Cotter* being afterwards in treaty for purchasing the reversion of this estate, and desirous to protect the term from being merged, by deed dated the 20th of *July*, 1695, assigned over the same to *William Cotter*, in trust for himself during his own life, and afterwards in trust for his eldest son *James Cotter*; who, upon his father's death in 1705, became entitled to, and accordingly entered upon, and for some time continued in the quiet possession of the premises, without any contest whatever.

But in *Trinity* term, 1711, the respondent, deriving under a fine levied and a settlement made of the reversion by the said Earl *Richard* his father, some time in the year 1682, exhibited an original bill, and soon after a supplemental bill in the Court of Chancery in *Ireland* against the said *James Cotter* and others, to impeach and set aside the interest under the said term of 151 years; in order to which it was, amongst other things, suggested by these bills, that Earl *Richard* had, in 1668, executed another lease of the same lands to one *Vincent Scott* for the term of 41 years, at the yearly rent of 12*l.* in trust for



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the said *Garret* and Sir *James Cotter*; and that his Lordship then also acknowledged a statute-staple for a certain sum of money to the said *Vincent Scott*, which, by a deed of defeazance, was declared to be only intended as a collateral security for the better performance of the covenants and conditions contained in such second lease; and that the said *Vincent Scott* had also by some deed, declared the same to have been so taken only in trust for the said Sir *James Cotter* and his brother *Garrett*, and assigned it over to the latter for their joint use and benefit; all which, as was suggested, did amount to a surrender, or at least an agreement to waive the benefit of the former lease for 151 years; and in order to give a greater colour of probability to such pretended agreement, it was further alledged, that their reason for coming into it was a persuasion and conviction they had, that the first lease was either void or voidable, as exceeding the lessor's power or authority to grant the same: And the bills further set forth, that Sir *James*, in his life-time, and, since his death, the said *James Cotter* his son, had got into their hands, and fraudulently with-held and suppressed the said several deeds; and that to carry on still the appearance of a title under the first lease, there had been some erasure made in the deed, by which the rent reserved was changed from 9*l.* to 12*l.* a year, with a view of making it the better to correspond with that sum, which had all along been paid annually for the premises; but that the respondent, who was become entitled, as reversioner, to re-enter upon the premises at the expiration of the second lease, was disabled from making out his title, or proceeding at law for the recovery thereof, on account of the said several supposed frauds; and therefore he, by his said bills, prayed a discovery of all these particulars, and to be decreed to the possession of the premises.

*James Cotter*, in his several answers to these bills, admitted to have heard of the second lease to *Vincent Scott*; but denied that thereby, or otherwise, it was agreed, or ever intended, to surrender or waive the first lease, or that there was any erasure or alteration therein; and therefore insisted upon the benefit of the first lease, as a subsisting lease, which his ancestor had purchased for so valuable a consideration, under an unquestionable title in the lessor, and which there could not have been any motive or inducement for departing with afterwards as was pretended,



tended, and he likewise denied the several other allegations of the bills.

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Issue being joined, and publication having duly passed, after a long examination of many witnesses on both sides, the cause came on to be heard in *Trinity* term, 1715, and afterwards re-heard in *Hilary* term following before the Lord Chancellor of *Ireland*, assisted by the Lord Chief Justice *Forster* and Mr. Justice *Dolben*; when, upon great consideration had of the several proofs and circumstances in the cause, and more particularly of the deposition of *Vincent Scott* himself, who was examined as a witness for the respondent, and on his death-bed denied any such agreement as was pretended; and it appearing likewise, that the old lease and bond were uncanceled and entire, without any erasure or alteration whatsoever; and that the taking an assignment of this concurrent or reversionary interest, whether accepted to prevent a law contest with *Vincent Scott*, or even to protect his first title under a mistaken apprehension that the same might be questioned by the Earl himself, or *Vincent Scott*, or any other lessee, were not a sufficient foundation in equity for setting aside the first purchase, the Court decreed both the respondent's bills to stand dismissed with costs; and were also pleased to direct his Majesty's Attorney-general to carry on a prosecution against some agents or solicitors that appeared guilty of indirect practices in tampering with *Vincent Scott* about his evidence in the cause.

This decree being afterwards inrolled, the appellant, under the sanction of it, treated for and became a purchaser of the remainder of the first term from his brother *James*, who assigned all his interest over to him for a valuable consideration, by deed dated the 22d of *September*, 1718; in pursuance whereof the appellant immediately entered upon and enjoyed the premises for many years, without any the least interruption or contest.

But on the 27th of *July*, which was after above five years acquiescence under the decree, the respondent exhibited a new bill in the same court against the appellant, and also against *James Cotter*, the eldest son of the said *James Cotter*, *Robert Reeves*,



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*Reeves, Francis Bernard, Esq; John Rogerson, Esq;* his Majesty's Attorney-general, and others; stating all that had been before alledged and insisted upon in his former bills; but disclosing no new matter whatsoever, other than the death of the said *James Cotter* in the year 1720, under an attainder of felony for a rape, of which he had been convicted; and that there had since been discovered fresh proofs to support the allegations of the original and supplemental bills concerning the suppression and concealment of the second lease for 41 years, and the other deeds relating thereto, by the said *James Cotter*, whilst the former suit was depending; and that the respondent had since got the same into his own power, which bore date respectively upon the 26th of *April* and 7th of *May*, 1668, together also with another deed, dated the 24th of *December*, 1681; by which it was alledged, that *Garret Cotter* had assigned or released his interest under the second lease to his brother *Sir James*; and it was also alledged, that by the second lease *Earl Richard* covenanted that he, his heirs or assigns should, within one year after the expiration of the said 41 years term, at the charge of the said *Vincent Scott*, his executors, administrators or assigns, renew the said lease for 28 years, to commence from the expiration of the said 41 years, at the same rent; and that an old mortgage made by his father, subsequent to the second lease, though satisfied, was still outstanding in the said *Francis Bernard*: The respondent therefore prayed, that the said decree of dismissal might be reversed or set aside; and that he might be decreed to the possession of the said lands, and to an account of the profits since the appellant became possessed thereof.

The appellant put in a plea to part of this bill, and insisted, that the several particulars thereby pretended to have been discovered, were not any new matter of fact which had not already been put in issue; but only fresh supplemental proofs of the same facts, which had been before examined into and determined upon in the former cause; and therefore, by the rules and practice of the Court, it was an improper foundation for any bill to reverse or impeach a decree made upon so great consideration: He also insisted upon his being a purchaser for a valuable consideration, long before the conviction of his said brother,



brother, and without notice of any title the respondent had to impeach the same. And by his answer to the rest of the bill, the appellant sets forth at large the several reasons which induced him to believe that the deeds alledged to be in the respondent's power were not genuine, or ever concealed by *James Cotter*; or if they had, yet, that the same being wholly immaterial, they ought not to affect the appellant's title to the premises.

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On the 4th of *June*, 1725, this plea came on to be argued before the Lord Chancellor of *Ireland*, when his Lordship was pleased to over-rule the same with costs.

Afterwards Mr. Attorney-general put in an answer; but insisted upon no title, by reason of the conviction of *James Cotter*, on account of the appellant's antecedent purchase. And the said *Francis Bernard* also put in an answer, and thereby submitted to act as the Court should direct.

This cause came on to be heard before the Lord Chancellor upon the 22d, 23d, 24th, 27th, 29th and 30th days of *April*, 1730; and upon the 3d of *July* following, his Lordship was pleased to direct a trial at law to be had by a jury of the county of *Corke*, upon the following issue; *viz.* whether the said several deeds, dated respectively the 25th of *April*, the 2d of *May*, and the 7th of *May*, 1668, and the other deed, dated the 24th of *December*, 1681, were in the possession of *James Cotter*, son of the said Sir *James*, and when; and whether the said deeds, or any, and which of them were concealed by him or his order?

A trial was accordingly had on this issue upon the 10th of *April*, 1731, before the Lord Chief Baron of the Court of Exchequer in *Ireland*; but the appellant being disabled to make a defence, by the death of those witnesses who had been examined in the former cause to the same points, the jury returned their verdict in these words, *viz.* "That the said four deeds were in the possession of the said *James Cotter*, the son of the said Sir *James*,  
" on the 5th day of *December*, 1711, and that the same were  
" concealed by him from that time, till the time of his death."



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This verdict being afterwards certified by the Lord Chief Baron, the cause came on to be further heard before the Lord Chancellor on the 17th of *May*, 1731, when his Lordship was pleased to decree, that the said lease for 151 years should be set aside, and delivered up to the respondent, as having been surrendered and determined by the acceptance of the said other lease for 41 years; and directed an account to be taken against the appellant, from the time he first came into possession, for what he made, or might have made of the said lands, without wilful default; and that an injunction should be directed to the Sheriff of the county of *Corke*, awarding him to put the respondent into possession of the premises; and also decreed the said *Francis Bernard* to convey the legal estate he had therein to the respondent.

P. Yorke.  
J. Strange.

From this decree, and also from the order for over-ruling the plea, the appellant appealed; insisting, that as this, in its own nature, seemed to be a bill of the first impression, so the over-ruling the plea put into it by the appellant, might become a precedent of the most dangerous tendency; and which, if once established, must lay open the justice of almost every decree to be called in question and re-examined, either upon a real or pretended discovery of further evidence to the same points, which had already been controverted and determined, and thereby introduce the utmost confusion, not only among the immediate suitors themselves, but all those deriving under them by purchase or otherwise, and be a great inlet to perjury and subornation. That the issue directed in this cause, and the facts found upon it, were plainly immaterial; and what ought not, therefore, in any sort to impeach or affect the appellant's title to the lands in question: Because neither the first acceptance or subsequent assignment of the new lease by *Vincent Scott* to *Garrett Cotter*, ever amounted to a legal surrender even of his own moiety of the old lease; and if any act thus done had wrought a surrender of his moiety, yet it could not affect the contingent interest either present or future of the other joint tenant, who was then in another kingdom, and an entire stranger to the whole transaction. Nor could the subsequent assignment alledged to have been made in 1681, amount in any sense to more than the release of one tenant in common to another, of whatever interest passed under the second lease. But there

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was not the least colourable foundation for presuming either of the joint tenants ever agreed or intended to waive the benefit of a valuable interest, to which their title was clear and unquestionable, and which had been purchased by their father at so high a price; especially considering the evidence of *Vincent Scott*, who best knew the truth of the whole transaction, and to the time of his death persisted in his denial of any such agreement. It was however objected, that it appeared by the evidence of one *Richard Barry*, a witness examined in the former suit, that on pretence of the lease for 151 years being a void lease, either because it exceeded the power which Earl *Richard* had to make leases, or because *Nicholas Astwood* happened to die in the life-time of the Countess Dowager, his Lordship, soon after her death, entered and distrained upon the premises, which gave birth to a law-suit on his part to set aside that lease; and that this dispute was afterwards compromised by an agreement between him and *Garrett Cotter*, by which the old term was to be surrendered, in consideration of a new lease for a less number of years, to be perfected by the same lessor. But it was apprehended, that the bare stating of this loose parol evidence was sufficient to shew the improbability of its being true in almost any one particular: For though it should be admitted, that the lessor had only a particular estate in these lands, which might make any act he did void, as against his remainder-man, yet, as it evidently could not be so against himself, there did not seem to be any colour or pretence for contesting the same in his life-time. Besides, it was hardly conceivable how any such suit should have taken its first rise by distraining upon the premises; or why, if it ever had been begun and carried on, there should not be now extant the least footsteps of any such proceedings upon record; or why the second lease for 41 years, with a covenant to renew for a further term of 28 years, should have been thought a more certain interest, or in less danger of being avoided than the other. But what rendered the whole of this evidence yet more improbable, and almost incredible, was, that it appeared of the respondent's own shewing, that the lessor had an absolute estate of inheritance in the premises, the respondent claiming by a settlement under him, which necessarily implied an antecedent power in him to execute the lease now contested; besides, it further manifestly appeared, that the  
lease



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lease to *Astwood* was made for 151 years, to commence absolutely at the death of the Countess, and not to depend upon his surviving her, or any other contingency whatever. Lastly, that although the old lease should be looked upon as an interest agreed to be surrendered, yet the appellant ought to have enjoyed the entire benefit of the second lease, which was allowed to be the only recompence and consideration for giving up so valuable a purchase as the other; nor ought he to be deprived of the benefit of the further term thereby covenanted to be granted, by being decreed to account for the profits from the time of his coming into possession, notwithstanding such covenant fully appeared in the cause, and amounted to a lease in equity for that term. It was therefore hoped, that the orders, and decree appealed from, would be reversed, and the respondent's bill dismissed with costs.

C. Talbot.

T. Lutwyche.

On the other side it was contended, that the concealment of the several deeds mentioned in the issue and verdict by *James Cotter*, the appellant's brother, and the subsequent transactions relating thereto, were unknown to the respondent, and not discovered till long after the dismissal of his former bill; and that several of these facts happening after such dismissal, could not be made use of in the former cause. That the appellant had neither in his answer or plea sworn to any particular consideration being paid for the purchase; nor did the instrument under which he claimed to be a purchaser, mention any particular consideration; nor had he proved that he ever paid or gave any consideration for such purchase: He ought therefore to be considered only as a volunteer, and must be affected with the fraud and ill practices of his brother *James* in relation to the deeds. Besides, it appeared in the cause, that *James Cotter* executed the assignment in the absence of the appellant, and without any previous agreement or communication with him concerning the same. And as to the appellant's having any benefit of the covenant for renewal, it appeared by the covenant, that application was to be made for such renewal within a year after the expiration of the 41 years lease; but the appellant's brother, instead of applying for a new lease, fraudulently set up the lease for 151 years; and by his answer



in the former cause, expressly waived the benefit of that covenant, as did the appellant likewise by his answer in the present cause. It was therefore prayed, that the orders and decree might be affirmed, and the appeal dismissed with costs.

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AFTER counsel had been heard on this appeal, the parties came to an agreement, which being reduced into writing and signed, was delivered in at the bar, and desired to be made the Order of the House. It was accordingly ORDERED and ADJUDGED, that the decree complained of should be so far varied, as that the appellant should have the benefit of the renewal of *Scott's* lease for 41 years of the lands in question for the term of 28 years, from the expiration of the said 41 years lease, according to the terms of the covenants therein; and that the appellant should be let into possession on the 1st day of *May* next; and that the respondent should answer a year and a half's rent of the estate in question, from the 1st of *November*, 1731, to the 1st of *May*, 1733, at 163*l.* a year, amounting to 244*l.* 10*s.* and the appellant was to answer for fifteen years reserved rent of the premises, at 12*l.* a year, from the 1st of *May*, 1718, to the 1st of *May*, 1733, amounting to 180*l.* which being deducted out of the said 244*l.* 10*s.* there remained due to the appellant 64*l.* 10*s.* which the respondent was to pay to the appellant on the said 1st day of *May* next; and the appellant was to deliver back the possession of the said estate to the respondent on the 1st day of *May*, 1737, when the said 28 years would expire: And no costs were to be paid by either party in this cause, either here or in *Ireland*; and with these variations, the decree was affirmed.

DECREE  
varied by con-  
sent.  
Jour. vol. 24.  
p. 224.



Case 9. *George Legh*, Esq; - - - Appellant.

The Right Honourable *George*, Earl of  
*Warrington*, *Henry Legh*, Jun. Gent. } Respondents.  
 and Sir *Henry Mainwaring*, Bart.

12th April, 1733.

2 Vefey 272.  
 569.  
 2 Eq. ca. ab.  
 372. ca. 19.

*SARAH*, Dutcheſs-dowager of *Somerſet*, by her will, dated the 17th of *May*, 1686, deviſed her manor of *Cberington*, in the county of *Wilts*, to the reſpondent's late brother, the honourable *Langham Booth*, and the heirs of his body, with other remainders over; and made the reſpondent's late father *Henry*, Earl of *Warrington* (then Lord *Delamer*) Sir *Samuel Grimſton* and Sir *William Gregory*, executors.

On the 10th of *February*, 1691, the teſtatrix, by a codicil to her will, revoked the deviſe of the ſaid manor, and in lieu thereof, directed 2,000*l.* to be laid out by Sir *William Gregory* and Sir *Samuel Grimſton*, and the ſurvivor of them and his heirs, within one year after her death, in the purchaſe of lands of inheritance, to be ſettled to the uſe of the ſaid *Langham Booth*, and the heirs of his body; and in default of ſuch heirs, to the uſe of his brother *Henry Booth*, and the heirs of his body; and in default of ſuch heirs, then to the uſe of the reſpondent and his heirs for ever.

On the 25th of *October*, 1692, the Dutcheſs died, leaving a perſonal eſtate much more than ſufficient to pay all her debts and legacies; and Sir *Samuel Grimſton* renouncing the executorſhip, and *Henry*, Earl of *Warrington*, dying on the 2d of *January*, 1693, Sir *William Gregory* alone proved the will and codicil; but before he laid out the 2,000*l.* as the codicil directed, he died; whereupon, on the 19th of *February*, 1705, adminiſtration, with the will and codicil annexed, was granted to the ſaid *Langham Booth*, who, by virtue thereof, poſſeſſed himſelf of aſſets of the Dutcheſs, amounting to much more than the 2,000*l.* and the intereſt due thereon, and all other debts and legacies; and he thereout retained, on account of the



the said 2,000*l.* and the interest thereof, the sum of 3,604*l.* 9*s.* 3*d.*

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The respondent being indebted to his sister, the Lady *Elizabeth Delves*, in 3,000*l.* she, by consent of her husband, *Thomas Delves*, Esq; gave to her brothers *Langham Booth* and *Henry Booth* the said 3,000*l.* to be equally divided between them; and by lease and release, dated the 23d and 24th of *June*, 1699, the respondent, for securing the said 3,000*l.* and the interest thereof at 4*l.* per cent. conveyed to the said *Thomas Delves* and others the manor of *Thornton* and *Thornton-Hall*, and other lands, redeemable on payment of 1,500*l.* and interest at 4*l.* per cent. to the use of *Langham Booth*, on the 8th of *September*, 1705, and 1,500*l.* and interest to the use of *Henry Booth*, on the 16th of *October*, 1708.

By other indentures of lease and release, dated the 21st and 22d of *January*, 1705, the respondent sold and conveyed to Mr. *Langham Booth* and his heirs, the manor of *Thornton* and other lands in *Thornton*, except the advowson, subject to the said 3,000*l.* debt. And Mr. *Langham Booth*, by deed dated the 22d of *January*, 1705, covenanted with the respondent, that the said purchased lands should stand liable as a security for the said 1,500*l.* and interest due to his brother *Henry Booth*, and to indemnify the respondent, and such part of the respondent's estate, as he had not purchased against this debt. And by deed dated the 14th of *September*, 1708, Mr. *Henry Booth* agreed to accept of the said security given by his brother *Langham*, and not to demand the same of the respondent, or any estate of his not sold to *Langham Booth*.

In 1719, Mr. *Henry Booth* wanting money, deposited the deeds of *Thornton* and other securities with one *Warren*, a broker, by way of pawn for money, which the respondent redeemed.

On the 12th of *May*, 1724, *Langham Booth* died without issue, having made his will, dated the 20th of *December*, 1722, in the beginning of which was this clause; viz. "As to my  
"worldly estate, which it hath pleased God to bestow upon  
"me, I give and dispose thereof in manner following; that is  
"to say, *Imprimis*, I will that all my debts which I shall owe

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“ at the time of my decease, be discharged and paid.” And afterwards, in the same will, he gave 100*l.* *per ann.* to Mrs. *Mary Saxon* for her life; and devised the said manor of *Tborton* and the other lands by him purchased as aforesaid (subject to the said annuity of 100*l.*) to the said *Henry Booth* for his life; remainder to his first and other sons successively in tail male; remainder to the respondent for life; remainder to his first and other sons successively in tail male; remainder to the appellant for life; remainder to his first and other sons successively in tail male; with other remainders over, and with a remainder to his own right heirs for ever. And at the end of his will was this clause; *viz.* “ *Item*, all my ready-money, securities for money, stock in public funds, arrears of rent, jewels, rings, watches, goods, chattels, rights, credits and personal estate whatsoever, I give, devise and bequeath unto my said brother *Henry Booth*, to and for his own use for ever; and I constitute and appoint my said brother *Henry Booth* sole executor of this my last will and testament.”

*Henry Booth* being then in *Holland*, renounced the executorship; whereupon the respondent took administration of the personal estate of the said *Langham Booth*, with his said will annexed; and on the 2d of *February*, 1726, *Henry Booth* dying intestate, without issue, the respondent took administration of his personal estate also.

The respondent, by the deaths of *Langham* and *Henry* without issue, became entitled (as he was advised) to the said 2,000*l.* and interest for the same, from the death of the said *Langham Booth*; and in order to have a satisfaction out of the real estate of *Langham Booth*, for so much of the said 2,000*l.* and interest, as his personal estate would not satisfy, the respondent, in *Michaelmas* term, 1727, filed his bill in the Court of Chancery against the appellant and others. To which the defendants put in their respective answers. And the appellant and other of the defendants brought their cross-bill, touching the same matters as were in the respondent's bill. To which cross-bill the respondent put in his answer, and thereby insisted, that the personal assets of *Langham Booth*, which remained after payment of his other debts, towards satisfying the respondent's demand of 2,000*l.* and interest, did not amount to 100*l.*

On



On the 15th of July, 1731, both causes were heard before his Honour the Master of the Rolls, who was pleased to decree, *inter alia*, that the respondent's bill, as to charging the said 2,000*l.* and the interest thereof, on the real estate of the said *Langham Booth*, should be dismissed; and that the respondent should account before the Master for the said *Langham Booth's* personal estate, and produce upon oath all books of account, papers and vouchers, and be examined on interrogatories, as the Master should direct. And the Master was directed to compute what was due to the respondent for principal and interest of the said 2,000*l.* And he was to retain the same out of the personal assets of the said *Langham Booth*.

733.

From this decree the respondent appealed to the Lord Chancellor, apprehending that he was aggrieved thereby; because the said debt of 2,000*l.* and interest was not decreed to be paid out of the real estate of the said *Langham Booth*, so far as his personal estate should be deficient. And also for that the decree directed the respondent to produce books and vouchers *upon oath*, contrary, as he humbly conceived, to the privilege of Peers.

On the 17th of May, 1732, the appeal was heard before the Lord Chancellor King, who declared his opinion, that the said 2,000*l.* was a charge on the real estate of *Langham Booth* by the words of his will; and was pleased to decree, *inter alia*, that the Master should take an account of the said *Langham Booth's* debts, and the said 2,000*l.* to be considered as a debt of the said *Langham Booth's*. And the respondent was to account before the Master for the personal estate of the said *Langham Booth*, and produce all books of account, papers and vouchers in his custody, and be examined on interrogatories, as the Master should direct. And the Master, in taking the said account, was to make all just allowances to the respondent. And it was further ordered, that so much of the real estate of which the said *Langham Booth* died seised in fee, should be sold, as his personal estate should fall short of satisfying the said 2,000*l.* And all proper parties were to join in such sale, and have their costs out of the monies arising thereby.



1733.

P. Yorke.

C. Talbot.

From so much of this latter decree as declared the 2,000*l.* to be a charge upon the real estate of Mr. *Langham Booth*, and directed any part of such real estate to be sold for satisfaction thereof, the present appeal was brought; and on behalf of the appellant, it was contended, that every charge upon lands by will, is, so far as it goes, a disherison of the heir at law; and therefore ought to be expressed clearly, and not be collected only from a possible implication, or doubtful construction. That the first clause in this will, and which the other side chiefly relied on, was no more than a common introductory clause inserted by scriveners of course in the beginning of wills, and only intimated what the testator was about to do; *viz. to dispose of all his estate*; and the direction, that all his debts should be paid, did not alter the nature or consequence of those debts, or the legal course of paying them. That all the subsequent devises particularly specified to what charge the testator intended his real estate should be subject; *viz. the rent charge of 100*l.* per ann.* which was repeated in every limitation; and carried along with it a strong implication, that he did not mean it should be burthened with any other. That there was no instance where the general words of a will so penned had been construed to charge real estates with debts by simple contract; and it was apprehended that such a charge could not be created otherwise than by express words, or a necessary implication; and a contrary construction might impeach the titles of a multitude of purchasers under wills, where there were the like clauses with those in the present case. That Mr. *Langham Booth* could have no reason to believe, that the 2,000*l.* would be esteemed a debt due from him, since, if he had laid it out in the purchase of lands, and settled them pursuant to the directions of the will and codicil, he might afterwards have barred that settlement, and subjected the lands to his own disposal, which would have entirely defeated the respondent's pretensions to the money, even as a debt upon his personal estate; and that this would have been the case was evident from his barring the entail in an estate called *Little Asbley*, which was devised to him by the same will, and settled to the same uses as the 2,000*l.* in question. It was therefore hoped, that the last decree, as to charging the real estate of *Langham Booth* with the payment of the 2,000*l.* would be reversed; and the first decree, as to that point, affirmed.

On



1733.

T. Lutwyche.

J. Willes.

On behalf of the respondent Lord *Warrington* (no case being made either for or against the other respondents) it was argued, that Mr. *Langham Booth* having retained out of the assets of the Dutcheſs, the 2,000*l.* directed by her to be laid out in the purchase of lands; the respondent, if the same had been so laid out, and in default of issue of his brothers, would have had an absolute estate in fee simple in such lands; and therefore he was now justly entitled to receive the money in lieu of the land in which it ought to have been invested; and consequently this demand of the respondent's was a just debt from *Langham Booth*. That the words of Mr. *Langham Booth*'s will were sufficient to charge his real as well as his personal estate; for he first disposed of his worldly estate in manner following; and then directed, *imprimis*, "that all his debts should be discharged and paid:" Now, the words *worldly estate*, undoubtedly comprehend real as well as personal estate; and therefore it was a disposition of both estates, for the payment of his debts, and this was what in justice and conscience he was obliged to do, there being a deficiency in his personal estate. But further, it is certain that Mr. *Langham Booth* intended that all his debts should be paid; and as his will and his intent therein expressly declared could not be fulfilled without charging his real estate therewith, his personal estate being deficient; it was most agreeable to justice, and the rules which have been always laid down concerning the construction of wills, to construe his will in such a manner, as that, there being a deficiency of his personal estate, his debts might be satisfied out of his real estate: And there are many precedents, where Courts of Equity have decreed real estates to stand charged with debts in cases of the like nature. That the respondent, who claimed the 2,000*l.* being heir at law to his brother *Langham*, this was not the claim of a stranger to charge lands in the hands of an heir, but the claim of an heir to be paid a just debt, out of an estate devised from him to a stranger and voluntary devisee; the respondent being only devisee for life in this estate of *Thornton*, which by the decree was charged with the 2000*l.* And if the real estate should not be subject to this charge, the appellant, who was no relation either to *Langham Booth* or the Dutcheſs, would in effect have the benefit of the Dutcheſs's legacy; while the respondent and his family would be deprived of it, contrary to the express words of her codicil,

and



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and contrary to the intent at least of Mr. *Langham Booth's* will; who could not be presumed to intend the benefit of his real estate to a stranger, exclusive of paying a just debt to his own brother.

DECREE  
affirmed.  
Jour. vol. 24.  
P. 231.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and such part of the decree as was therein complained of, affirmed.

Case 10.

*Mary, Lady Viscountess* } Plaintiff  
*Dowager Laneshorough,* }

in Error.

*Mark Anthony Morgan, Esq;* } Defendant  
*Lessee of George Fox, Esq;* }

26th April, 1733.

Forrester 262.  
Viner, vol. 8.  
p. 111. ca. 35.  
2 Eq. ab. 341.  
ca. 17.  
Fearne's Con-  
ting. Rem.  
325.

IN *Hilary* term, 1726, Mr. *Fox* brought an ejectment in the Court of Exchequer in *Ireland*, against the Lady Dowager *Laneshorough*, for several castles and lands in the county of *Longford*: To which Lady *Laneshorough* pleaded, not guilty. And in *Michaelmas* term, 1727, the cause came on to be tried by a special jury at the bar of the said Court; who found a special verdict: *viz.*

That Sir *George Lane*, Knt. and Bart. afterwards Lord Viscount *Laneshorough*, was seised in fee of the said castles and lands; and being so seised, did, in consideration of a marriage between his son *James* and the said Lady *Laneshorough* (then *Mary Compton*) and of 2,000 *l.* marriage portion, by indentures of lease and release, dated the 3d and 4th of *May*, 1676, convey the said castles and lands to *Thomas* Earl of *Offory*, *Richard* Earl of *Arran*, *Henry* Lord Bishop of *London*, and Sir *Hugh Cholmondeley*, Bart. and their heirs, upon the trusts and to the uses following; *viz.* that the said *James Lane* should have thereout, during the joint lives of him and Sir *George Lane*, one annuity of 300 *l.* and in case the said intended marriage should take effect, then after the death of the said *James Lane*,  
that



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that the said *Mary Compton* should have and receive one annuity or yearly rent of 320*l.* for her jointure, and subject thereto to the use of the said *Sir George Lane* for his life, without impeachment of waste; and then to the use of the said *James Lane* for 99 years, to commence from the decease of his father *Sir George Lane*, if the said *James Lane* should so long live, without impeachment of waste; and then to the use of the said Earl of *Offory*, Earl of *Arran*, Bishop of *London*, and *Sir Hugh Cholmondeley*, and their heirs, during the life of the said *James Lane*, upon trust to support the contingent remainders; and then to the first son of the body of the said *James Lane* on the body of the said *Mary Compton* to be begotten, and the heirs male of the body of such first son; with like remainders to all other the sons of the said marriage successively, in tail male; and for default of such issue, then to the use of the heirs male of the body of the said *James Lane*; and then to the right heirs of the said *Sir George Lane*.

That on the 5th of *May*, 1676, the marriage was had, and the said 2,000*l.* paid to *Sir George Lane*.

That *Sir George Lane*, then Viscount *Lanesborough*, being seised in fee of the reversion of the said premisses, did, on the 10th of *July*, 1683, make his will; and did thereby, among other things, devise in the words following: "*Item*, I will  
" and devise the manor and town of *Lanesborough*, and all other  
" the lands, tenements and hereditaments, mentioned or con-  
" tained in the settlement made by me on the marriage of my  
" said son *James Lane* with the daughter of *Sir Charles Comp-*  
" *ton*, second brother to the late Earl of *Northampton*, on  
" failure of issue of the body of the said *James Lane*; and  
" for want of the heirs male of my body, to my said  
" daughter *Frances Lane*, and the heirs of her body lawfully  
" to be begotten; and for want of such issue, to my said  
" daughters the Lady *Beaufoy* and *Mary Bingham* severally,  
" and the heirs of their bodies lawfully begotten or to be  
" begotten, severally and respectively; and for want of such  
" issue, that all and every of the premisses shall be and remain  
" to his Grace *James*, Duke of *Ormond*, and the heirs male  
" of his body lawfully begotten or to be begotten." And,  
in a subsequent part of his will, the testator did will and



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devise, that if his said son *James Lane* should die without issue male, his the said testator's wife surviving him, his said wife should hold and enjoy his house and park in *Ratblin*, and all the houses, lands, tenements and hereditaments in the county of *Longford*, wherein he had any estate of inheritance in possession, reversion, or remainder, for and during her natural life; and after her decease, to the several uses to which the same were limited as aforesaid; and made his said wife executrix of his will.

That on the 1st of *December*, 1683, the said *George*, Lord Viscount *Lanesborough*, died, so as aforesaid, seised of the same reversion of the manors, towns and lands, in the declaration mentioned; and had issue at the time of his death the said *James*, his only son and heir; and two daughters (namely, *Mary* and *Charlotte*) by his first wife, and the said *Frances* by his second wife, and no other issue male. — That *Thomas*, Earl of *Offory*, died on the 2d of *June*, 1681; and that *Frances*, Viscountess *Lanesborough*, the widow of *George* Lord *Lanesborough*, died the 1st of *May*, 1700, in the life-time of the said *James* Viscount *Lanesborough*.

That *James*, Viscount *Lanesborough*, after the death of his father, entered upon the premises, and was thereof possessed; and the said surviving trustees became seised of the said manors, towns and lands in the declaration mentioned, by virtue of the said deeds of lease and release of the 3d and 4th of *May*, 1673, in such manner as the law allows.

That the said *James* Viscount *Lanesborough*, and the said Earl of *Arran*, Lord Bishop of *London*, and Sir *Hugh Cholmondeley*, the then surviving trustees, by indentures of lease and release dated the 16th and 17th of *October*, 1684, for the barring all estates tail, reversions, and remainders; and to the end, to settle and assure the premises as therein after mentioned; did convey to *Edward Brabazon*, Esq; and *William Smythe*, Gent. and their heirs (amongst others) the manors, castles and lands in question, to the intent and purpose, that one or more common recovery or recoveries, might be thereof had and suffered; which said recovery or recoveries should be and enure to the use of the said *James* Viscount *Lanesborough*, for his life, without impeach-



impeachment of waste; and after his decease, then to the use of the Lady *Mary Viscountess Lanesborough*, wife of the said *James Viscount Lanesborough*, for her life, as and for an encrease or augmentation of her jointure, and in bar of her dower and thirds, at common law; and after her decease, then to the use of the said *James Viscount Lanesborough*, and his heirs.

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That in *Hilary* term, 1686, the said recovery was accordingly suffered; in which *Fergus Farrell*, Esq; and *Edward Nangle*, Gent. were demandants, and the said *Brabazon* and *Smyth*, were tenants, who vouched the said *James Viscount Lanesborough*, who vouched the common vouchee.

That the said *James Viscount Lanesborough*, being so possessed of the manors, towns and lands in question, did make his last will and testament, dated the 15th of *October*, 1722, and did thereby devise to *George Hooper*, Lord Bishop of *Bath and Wells*; and *Hatton Compton*, Lieutenant General; and *Robert Dormer*, Esq; a Judge of the Common Pleas; and *James Middleton*, Esq; and their heirs; all his manors, lands, tenements and hereditaments whatsoever, in the kingdom of *Ireland*, in which he, or any person in trust for him, had any estate of inheritance, or other interest in possession, reversion, remainder, or expectancy, in trust nevertheless and to and for the several uses therein after expressed; that is to say, that from and after his decease, his said trustees should stand and be seised of all the said premises in the said county of *Longford*, in trust for the heirs of his body: And for want of such issue, he did will and devise that the said trustees should permit and suffer his sister *Charlotte*, Lady *Beaufoy*, for and during her life, to have and receive for her own use and behoof of the rents, issues and profits of the farm and land of *Coolcroy*, barony of *Rathline*, in the said county of *Longford*; and after her decease, his said trustees should permit and suffer his said wife to have and receive, to her own use, the rents, issues and profits of the said premises last mentioned. And his will was, that his said trustees should suffer his said wife, from and immediately after his decease, to have and receive to her own use, all the rents, issues and profits of all the rest and residue of his said manors, lands and real estate, in the kingdom of *Ireland*, for her life; and



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and after her decease, he directed that his trustees should convey the said premises to the several uses in the said will mentioned; viz. to the use of *John Bell Lane*, the eldest and only grandson of his sister *Mary Bingham*, afterwards called *Mary Middleton*, deceased, for his life; and after his decease, to the use of his first and other sons in tail male, with several remainders over: And he appointed his said wife sole executrix of his will,

That on the 30th of *August*, 1724, the said *James Viscount Laneborough*, died possessed of the manors, towns and lands in question, and without issue.

That the said *Frances Lane*, daughter of the said *George*, Lord Viscount *Laneborough*, and devisee in his said will, married *Henry Fox*, and by him had issue *George Fox*, the lessor of the plaintiff, her eldest son and heir; that the said *Henry* died on the 13th of *October*, 1718; and the said *Frances* died on the 12th of *December*, 1712, leaving the said *George*, the lessor of the plaintiff, her eldest son and heir of her body; who, on the 1st of *September*, 1724, entered upon the said premises, and was thereof seised as the law directs, and made the lease to the said *Mark Anthony Morgan*, as in the declaration mentioned, who entered upon the premises, and was possessed thereof until the said *Mary Viscountess Laneborough*, entered upon the premises and ejected him. But whether upon the whole matter, the Lady Viscountess *Laneborough* was guilty of the said trespass or not, the jury submitted to the judgment of the Court.

This verdict being several times argued, the Court, in *Hilary* term, 1730, gave judgment for *Morgan* the lessee of Mr. *Fox*, and 68*l.* 18*s.* for damages and costs.

Whereupon, the Lady *Laneborough* brought her writ of error in the Exchequer-Chamber in *Ireland*; and the matter being again several times argued, the judgment was, in *Easter* term, 1732, affirmed.

C. Talbot.

D. Ryder.

To reverse both these judgments, Lady *Laneborough* brought her writ of error in Parliament; and on her behalf it was argued, that the title of Mr. *Fox* was under the will of *George*

Viscount



Viscount *Lanesborough*, as he was the heir of the body of *Frances*, the daughter and devisee of Lord *George*; but that this title was not good in two respects. I. Because that devise, if it ever was good to vest the estate in *Frances*, must be of a remainder dependent on a precedent estate tail in Lord *James*, and consequently would be barred by the recovery suffered by him and the surviving trustees in his marriage settlement. II. Because if there was no estate tail precedent in Lord *James*, the devise to *Frances* was absolutely void. — As to the former, it was submitted, that by the devise in the will of Lord *George*, to his daughter *Frances*, on failure of issue of the body of *James*, and for want of heirs male of the body of the testator, an estate in tail general and in tail male was given to *James* by implication; since the daughter was plainly not to take till there was a failure of all such issue of *James*, and of all such issue male of the testator, as were included in such estates tail: And that this was agreeable to many cases of estates raised by implication in a will. — As to the latter, supposing this not to be a devise of an estate tail by implication, Lord *James*, as heir at law of the testator, must necessarily take in the mean time, till the devise to the daughter could take effect; and then the devise to her being future, and not depending upon any particular precedent estate, created by the will, or even by any settlement, must be an executory devise. But, as it was to take effect only on the contingencies of the failure of issue of *James*, and of the heirs male of the body of the testator, it was apprehended to be void, as being too remote, and tending to a perpetuity. The consequence of this would be, that the whole of the testator's reversion in fee descended to Lord *James*; and thereby not only the title of the lessor of the plaintiff failed, but the recovery and will of Lord *James*, under which the plaintiff in error claimed, would be established; and that therefore, the judgments below would be reversed, and a new judgment given for Lady *Lanesborough*, with costs.

On the other side it was contended, that as to the lands comprised in the settlement of *May*, 1676, Lord *James* did not take by the will any greater or other estate than he had by the settlement; because nothing can pass in a will by implication, unless it be such a necessary implication, that no other construction can be made of the intent of the devisor. It seems plain,

P. Yorke.

T. Lutwyche.



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plain, that the testator only intended by his will, to dispose of the reversion in fee which was reserved to him by the settlement, for which reason he took notice of the settlement in his will; and the estate being thereby limited so far, as to his son *James* for 99 years if he so long lived, with remainder to his first and other sons in tail male, so that *James's* sons, if he had any, might enjoy it; the testator intended by his will, in case *James* should have no sons, to dispose of that reversion to his daughter *Frances* in tail. That the testator did not appear minded to give *James* a greater estate than for life, in any part of his freehold estate, and therefore having tied him up by the settlement, as to the lands in question, so in his devise to him by his will of the lands in *Leitrim*, &c. which were not comprised in the settlement, he made him tenant for life only, with like remainders to his sons as were limited in the settlement of the other lands. But in the other parts of his will, where he intended any thing for his son *James*, he gave it to him with express and particular words of limitation, such as, *to him, his executors, and assigns, or to him for his life, and after to his first son, &c.* And therefore, in all probability, he would have been as express here, as in other parts of his will, if his purpose had been to give *James* any further estate in these lands, than he would have by the settlement. It likewise seems evident, from the introductory words of the subsequent clause, whereby the house and park at *Rathline*, part of the settled estate in question, were devised to the testator's wife for life, viz. *if my son James shall die without issue male, my said wife surviving him*; that he could never intend to give an estate in tail general to *James*, whereby the limitations of his will might be defeated: But the construction contended for by the other side, was by an implication only, to enable *James* to defeat all the limitations of any part of the settled estate, either to the testator's wife, or his daughter *Frances*, for whom it appeared to have been his principal view to provide. And therefore, when the testator in the clause in question, recited the settlement whereby he had settled this estate on his son *James* and his issue; his saying, *on failure of issue of the body of the said James*, ought to be understood in the same manner, as if he had said, *on the determination of the estate limited by such settlement.*

AFTER



AFTER hearing counsel on this writ of error, and also the unanimous opinion of the Judges present, touching certain points of law to them proposed\*; it was ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer, and the judgment given in the Exchequer Chamber affirming the same, should be reversed.

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JUDGMENTS  
reversed.  
Jour. vol. 24.  
p. 248.

*Henry Holmes*, Esq; and *Ann* his Wife, Appellants. Case 11.

*John Lysaght*, Esq; - - Respondent.

2d May, 1733.

**NICHOLAS** *Lysaght*, the father of the respondent, and the appellant *Ann* and several other children, hearing that the appellant *Henry*, whom he entertained at his house as a relation, (being his wife's nephew, and a lieutenant of foot) had been privately making his addressees to the appellant *Ann*, in order to a marriage, severely rebuked her for admitting the same; and threatened, if he found she encouraged that affair, he would that instant turn her out of doors, and he, at the same time, forbid the appellant *Henry* his house.

Grounds and  
Rudiments of  
Law and E-  
quity, p. 198.  
ca. 3.

Soon afterwards *Mr. Lysaght* made his will, dated the 24th of September, 1724, and thereby devised the bulk of his real estate, which did not exceed 1875*l. per ann.* to the respondent; and made the next immediate bequest to the appellant *Ann* in these words, viz. "Item, I leave and bequeath to my said daughter *Ann Lysaght* 2,000*l.* sterling, to be paid her on the day of her marriage, or at the age of 21 years, which shall first happen; and in case my daughter *Ann* shall marry with the consent and approbation of *Robert Oliver*, Esq; *Berkeley Taylor*, Esq; *John Croker*, Esq; and my said son *John*, or any two of them, I further leave and bequeath to my said

\* The questions which were put to the Judges on this occasion, are not inserted in the Lords Journal; but they appear in *Mr. Forrester's* report of this case, p. 267, 268.

" daughter



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“ daughter *Ann*, the additional sum of 2,000*l.* more, *otherwise*  
 “ not : And for her yearly maintenance, I leave and order 120*l.*  
 “ sterling until her marriage, or that she attain to the age of  
 “ 21 years, which shall first happen.” — The testator then  
 bequeathed the like portion to his younger daughter *Mary* on  
 the like condition, (which she afterwards performed) and  
 devised part of his real estate, of about 280*l.* *per ann.* to his  
 younger sons *Nicholas* and *Arthur*, with pecuniary legacies of  
 1,000*l.* to each of them ; and after making several other  
 bequests, he ordered that the respondent should pay all his  
 debts and legacies ; and the better to enable him to do so,  
 bequeathed to him his personal estate, amounting to about  
 12,000*l.* and appointed the said *Berkeley Taylor*, *John Croker*  
 and the respondent, executors of his said will. And by a codi-  
 cil thereto, executed on the 25th of *August*, 1725, he added  
 the said *Robert Oliver* and also *Bartholomew Purdon*, Esq; as  
 executors, and in a day or two afterwards died ; whereupon  
 the respondent solely proved the will.

The appellant *Ann* coming of age in *January*, 1725, applied  
 to the respondent for both the said sums of 2,000*l.* ; alledging,  
 she was entitled to the same, tho' not married ; but the respon-  
 dent disputing this matter with her, and *Henry Rose*, Esq; a  
 barrister at law and a relation of the family, soon after coming  
 to the respondent's house in the country, where the appellant  
*Ann* resided, it was referred to him ; who gave his opinion,  
 that she was then entitled to the first 2,000*l.* and interest, but  
 not to the additional 2,000*l.* until the condition preceding the  
 bequest thereof was performed.

Notwithstanding this opinion, and the known aversion which  
 the respondent had to a marriage between his sister *Ann* and  
 the appellant *Henry*, and his having repeatedly refused his  
 consent thereto ; yet, they were privately married some time in  
 the month of *January*, 1726. And in *Michaelmas* term, 1728,  
 they thought proper to file their bill against the respondent, in  
 the Court of Exchequer in *Ireland*, alledging, that *Nicholas*  
*Lyfaght*, the father, had devised to the appellant *Ann* 4,000*l.*  
 that she attained her full age before marriage, that the respon-  
 dent being informed by the appellant *Ann*, in *Dublin*, of the  
 appellant *Henry's* making application to her for marriage,  
 seemed



seemed to approve it, and soon after took a voyage to the isle of *Wight*, and prevailed on the appellant *Ann* to go with him, where he knew the appellant *Henry* then was, or was soon expected; and that when he found the appellant's affections engaged, and that his sister could not with honour break off the match, he refused his consent. — That previous to the marriage, Mr. *Oliver* having taken advice on the clause in the will, got an opinion, that it was only *in terrorem*; and that he having sent the appellant *Ann* a copy thereof, he thereby shewed his consent to the match: And therefore the bill prayed, that the respondent might account for the 4,000*l.* and interest, and for the arrears of maintenance.

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The respondent, by his answer to this bill, denied that he ever approved of the match, but on the contrary expressly cautioned the appellant *Ann* against it, and which caution she promised to observe; he also denied that he took a voyage to the isle of *Wight*, as insinuated by the bill, but went to *London*, from whence he carried the appellant *Ann* to the island at her own intreaty, but denied that he knew or expected he should meet the appellant *Henry* there. He submitted to account with the appellants for the first 2,000*l.* and the arrears of maintenance, but insisted that the appellant *Ann* could not be entitled to the additional 2,000*l.* by reason of her marrying without such consent, as was required by the will.

On the 3d of *October*, 1729, the respondent exhibited a cross-bill against the appellants, for discovery of the matters aforesaid; to which they put in their answer, admitting that the appellant *Ann* did not ask the respondent's consent; that being twice charged by the respondent, once in *Dublin*, the second time in the isle of *Wight*, with receiving the appellant *Henry*'s addresses, she denied the same; that she applied before her marriage, to Mr. *Oliver* and Mr. *Taylor* for their consent, but did not receive any answer from *Oliver*, but was afterwards told by him, he had wrote her an answer, which, for ought she knew, was a denial of his consent.

Witnesses having been examined in the original cause, and publication passed, the same was heard on the 2d and 21st of *June*, 1731, and, on the 25th of *February* following, the Lord



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Chief Baron declared, that this case depended on the words of *Nicholas Lysaght's* will; that as to 2,000*l.* and the maintenance, the court was of opinion, that the appellant *Ann* was entitled thereto, but not to the additional 2,000*l.* for that was not to be paid her, unless she complied with the terms, and performed the conditions prescribed by her father's will, which she had not done; that it appeared she married without the consent of the trustees, or any two of them, and that the respondent did not appear to have been guilty of any fraud in taking the appellant *Ann* to the isle of *Wight*; and therefore the court ordered, that the appellants should be paid the sum of 2,000*l.* only, together with the yearly maintenance provided for the appellant *Ann* by the will of her father, until her intermarriage with the appellant *Henry*; and that from and after her said marriage, the appellants should be paid the legal interest of the said 2,000*l.* and as to the additional 2,000*l.* their bill was dismissed.

C. Talbot

D. Ryder.

The appellants apprehending this decree to be erroneous, appealed from it; insisting, that the condition annexed to the second legacy of 2,000*l.* was in restraint of marriage, and that conditions of this nature are, from public considerations, never favoured; but, according to the known rule and practice in Courts of Equity, are held to be *in terrorem* only, and not to defeat a legacy given out of a personal estate, unless it is expressly given over to a third person upon a breach of the condition, but which, in the present case, it was not. That in the case of legacies out of personal estates, there has been no distinction allowed between conditions precedent and subsequent; such distinction being unknown to the civil law, by which legacies, which are properly cognizable in the Spiritual Court, are to be determined. That in this case it was apprehended, the condition was not intended to continue, or to suspend the legacy, longer than till the daughter attained her age of 21, which appeared from the manner of penning the legacy; the testator gives her 2,000*l.* to be paid her on the day of her marriage, or age of 21 years, and then goes on immediately in the same sentence, and if she marries with the consent therein mentioned, then 2,000*l.* more; so that this was nothing more than annexing a condition to that marriage, on which the first 2,000*l.* was payable, and as that marriage was to be before 21,



so was that on which the second 2,000*l.* was payable; but on her coming of age, it was her age, and not her marriage, which entitled her to both. That all the other executors, except the respondent, refused to act, and thereby the condition of marrying with the consent of two of them, was, in effect, rendered impossible, which ought not to turn to the disadvantage of the legatee; since it was to no purpose to attempt to perform a condition, which, by the act of the executors and trustees was made impracticable. But, if the consent of two of the trustees should be deemed necessary to entitle the appellants to the additional 2,000*l.* it was apprehended, that the opinion sent to the appellant *Ann* by Mr. *Oliver*, one of the trustees, and the respondent's carrying her to the house of the appellant *Henry*'s father in the isle of *Wight*, where he well knew the appellant *Henry* then was, amounted to a consent on the part of the respondent; and especially, since he himself was to take the benefit of the forfeiture. And lastly, that the first 2,000*l.* was devised to the appellant *Ann* at her age of 21, and consequently should carry legal interest from that time; whereas interest was only decreed from her marriage, which was a considerable time afterwards.

On the other side it was said to be evident from the will, that the additional 2,000*l.* never vested in the appellant *Ann*; because her right to this sum was to arise upon her performance of a precedent condition, corroborated by the negative words, *otherwise not*; which condition, against her own conviction of the reasonableness of it, and the repeated cautions of the respondent, she wilfully broke. That this additional sum of 2,000*l.* which was the voluntary gift of the testator, was not made payable, but upon her marrying with consent; and therefore the interest of the respondent, who was the legatee of the fund out of which this legacy was *prima facie* payable, ought not to be taken from him and transferred to her. That the testator, in his life-time, expressed his dislike to the match, and in the strongest terms forbid the appellant from complying with it, and he actually had the preventing of so unequal a match in contemplation, at the time of making his will; nor were the circumstances of the appellant *Henry*, in any way mended at the time of the marriage. That the appellant *Ann* had,

P. Yorke.

T. Lutwyche.



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had, at all events, a handsome provision left her at her own disposal, far exceeding what the appellant *Henry* could reasonably expect; and as she wanted but five months of 21, when the testator died, it could not be supposed that the condition was intended to bind for that time, and no longer. That the pretended opinion procured by Mr. *Oliver* for the appellant *Ann*, and at her instance, was on the occasion of her demanding the whole 4,000*l.* upon her coming of age, at which time it was insisted, that the appellant *Henry* had not begun to make his addresses to her; but it was manifest, that she well understood that this transaction did not amount to a consent from Mr. *Oliver*, since she admitted, by her answer to the cross-bill, that when she afterwards intended to marry the appellant *Henry*, she wrote to Mr. *Oliver* for his consent, which, for ought she knew, he refused.

DECREE  
affirmed,  
by consent.  
Jour. vol. 24.  
p. 252.

ON the day fixed for hearing counsel on this appeal, the counsel for the appellants acquainted the House, "that as the parties were nearly related, an accommodation of the matter in dispute had been treated of and compromised, and that bonds for the performance of the agreement between them had been signed and sealed; and that the appellants did submit, if their Lordships so pleased, that the decree might be affirmed." And the respondent's counsel admitting the matter so to be, the agreement was delivered in and read; and it was thereupon ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed.

*Ann*



*Ann Evelyn, Elizabeth Evelyn and Mary Evelyn, the three Daughters and only Issue of George Evelyn, Esq; deceased, Infants, by their next Friend, Edward Evelyn, Esq; and James Evelyn his only Son, an Infant, Charles Boone and Mary his Wife, and James Worlesley, Esq;* } Appellants. Case 12.  
 } Respondents.

25th May, 1733.

**G**EORGE Evelyn, the elder, Esq; had issue five sons, namely, *John* the eldest, *George* the respondent, *Edward*, *Richard* and *William*; and being seised of an antient family estate, part of it, viz. the manor of *Walkamstead*, alias *Godstone*, and other estates in *Surry*, in fee, and as to the rest, called *Nobred*, and some other lands in the said county, for life only, with remainder to his eldest son *John Evelyn* in tail male; and remainders to his other sons successively in tail male; came to an agreement with his eldest son *John* for making a new settlement thereof, in order to continue the same in his name and family: Accordingly, by indenture tripartite, dated the 20th of *October*, 1698, made between *George Evelyn*, sen. of the first part, *John Evelyn*, the eldest son, of the second part, and *Richard Bromhall* and *Thomas Bromfield* of the third part; it was witnessed, that in consideration that the said *George Evelyn*, sen. did agree to settle the manor of *Walkamstead*, alias *Godstone*, in the county of *Surry*, (except so much thereof as lies within the borough of *Brindley Heath*, with the quit-rents of the said manor, and the advowson of the parish church of *Godstone*, and the tythes of *Godstone* and *Tandridge*, and coppice woods in *Godstone*, and wood lands, containing 300 acres, and other lands in those two parishes particularly mentioned, of which he was then seised in fee) to the same uses and estates, and subject to the like provisos, as the lands and tenements therein after limited, to *George Evelyn*, sen. for life, and after his death, to his first and other sons in tail male successively, were thereby limited and settled; as also for barring all remain-

2 Wms. 591.  
 Viner, vol.  
 14. p. 240.  
 note to ca. 11.  
 285. note to  
 ca. 18. 286.  
 ca. 22. vol. 16.  
 p. 433. ca. 4.  
 6. and note to  
 ca. 5. 478.  
 note to ca. 5.  
 486. note to  
 ca. 4.  
 2 Eq. ca. ab.  
 501. ca. 34.  
 648. ca. 26.



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ders and intails of the lands and hereditaments therein after mentioned, and settling the same to the uses, and subject to the provisos therein after mentioned; the said *George Evelyn*, sen. and *John* his son, covenanted with *Bromball* and *Bromfield*, to suffer a common recovery of the messuage and lands called *Nobred*, and of several lands and woods in the parishes of *Godstone* and *Tandridge* aforesaid, to the following uses, viz.

As to the said messuage and lands called *Nobred*, and the lands and woods thereto belonging, and 86 acres of the wood lands, to the use of *George Evelyn*, sen. in fee; and as to all the rest of the said lands, to the use of the said *George Evelyn* sen. for life, without impeachment of waste; remainder to *John*, his eldest son, for his life; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; remainder to *George Evelyn*, jun. the second son, for his life, *sans* waste; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; remainder to the respondent *Edward Evelyn*, the third son for his life; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; with like remainders over to *Richard* and *William Evelyn*, the two other sons of the said *George Evelyn*, sen. successively, for their several lives, and to their sons successively, in tail male; remainder to the heirs male of the body of the said *George Evelyn*, sen. remainder to him in fee.

Provided, that it should be lawful for *George Evelyn*, sen. by deed or will, to charge by way of lease, mortgage, or otherwise, the lands and premises so limited to him for life, with the raising and payment of any sum of money, not exceeding 6000*l.* payable as therein mentioned; or by lease or leases, or otherwise, to charge the premises with the payment of any annuity for the life or lives of any person or persons, to be computed at the rate of ten years purchase, and that not to exceed 6000*l.* And, that it should be lawful for *George Evelyn*, sen. with such of his sons who should be next in remainder, and after his death for his sons, when in possession of the premises, by virtue of the said limitations; by deed, to limit a jointure before or after marriage, to the wife or wives of the said sons,  
for



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for her or their life or lives, of all or any part of the premises, after the rate of 100*l.* a year, for every 1000*l.* portion.

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Provided also, that it should and might be lawful to and for the said *George Evelyn*, the father, together with such of his said sons as, for the time being, should be next in remainder after his death; and after the death of the said *George Evelyn* the father, then to and for all and every the son and sons of the said *George Evelyn* the father, severally and successively, when they should be respectively in possession of the said messuages, lands, tenements, hereditaments, and premises, by virtue of any of the limitations aforesaid; by any deed or deeds, writing or writings, under his or their hand and seal, hands and seals, signed and sealed by him or them respectively, in the presence of three or more credible witnesses, to make any lease or leases for years, without impeachment of waste; but without prejudice to any jointure or jointures that should be made by virtue of the before mentioned proviso; for the raising a portion or portions for the daughter or daughters of such son or sons, so making such lease or leases; so as the portion or portions to be raised, should not exceed the portion or portions, fortune or fortunes, in money, goods, or chattels, of the wife or wives that such son or sons so making such leases, should marry; and so as such lease or leases should not take effect, till there should be a failure of issue male of such son or sons so making such lease or leases.

Proviso for *George Evelyn*, sen. and for his sons, as they should respectively come into possession, to make leases of the premises for any number of years, not exceeding 21 years, in possession and not in reversion, at the best rent, payable quarterly or half yearly, without taking any fine.

A recovery was suffered accordingly, and by indentures of lease and release, made between the same parties, and dated the 21<sup>st</sup> and 22<sup>d</sup> of October, 1698, in consideration that the said *John Evelyn* had joined with his father in suffering the said recovery of the premises, and settling the same to the uses, and subject to the provisos in the said indenture limited and expressed; and in pursuance of the agreement therein mentioned for that purpose, *George Evelyn*, the father, granted and confirmed



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confirmed to the trustees and their heirs, the manor of *Walkamstead*, alias *Godstone*, and the tithes and other lands and estates in *Godstone*, to the same uses, upon the trusts, and subject to the same powers and provisos, as were limited and declared by the former settlement; except, that in the power to raise portions for daughters, the following words were added, viz. “and so as such lease or leases be determinable upon the raising the said portion or portions, and of the costs and charges of raising the same.”

*George Evelyn*, sen. in pursuance of the power reserved to him by the last deed, executed his power of raising 6000*l.* as to the sum of 1500*l.* part thereof, by making a mortgage of the premises, dated the 1st of *April*, 1699, to one *Thomas Gregg*, for 500 years, for securing 1500*l.* and interest; which mortgage afterwards, by mesne assignments, became vested in *Sir Thomas Pope Blount*, and remained a charge upon the estate.

In *June*, 1699, *George Evelyn*, sen. died, leaving issue the said *John*, his eldest son, *George Evelyn*, jun. father of the appellants, his second son, the respondent *Edward Evelyn* his third son, and *Richard* and *William* his two other sons; and in 1703, *John*, his eldest son, died without issue, and unmarried; whereupon the remainder limited to *George* the second son, came into possession.

By indenture of three parts, dated the 22d of *August*, 1720, made between *George Evelyn*, jun. of the first part, *Thomas Garth* and *Mary* his daughter, of the second part, the respondent *James Worsley*, and other trustees since deceased, of the third part; reciting a marriage intended between *George Evelyn*, jun. and *Mary Garth*, whose portion was agreed to be 8000*l.* for settling a suitable jointure on her and her issue male; and that 8000*l.* should, on failure of issue male, be secured to their daughters.— And reciting the said indenture of the 20th of *October*, 1698, and the recovery thereon, and the indentures of the 20th and 21st of *October*, 1698, and the several provisos in the said indentures; it was witnessed, that in consideration of the said marriage, and marriage portion of 8000*l.* and in pursuance of the agreement made for settling a suitable jointure on *Mary Garth*, the said *George Evelyn* the younger, by virtue and in pursuance of the powers and authorities to him given, as well by



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by the said recited settlement, as by any other power and authority, did assign, limit and appoint, to the use of *Mary Garth* for her life, to take effect after the death of the said *George Evelyn* the younger, as and for her jointure and in bar of dower, the messuages, lands, tithes and tenements, in *Godstone, Tandridge, and Bletchingly*, in the county of *Surry*, not exceeding 800*l.* a year, being suitable to her portion. —

And the said indenture further witnessed, that in consideration of the said intended marriage, and marriage portion paid, and for the settling a suitable portion or portions on the daughter or daughters of him the said *George Evelyn*, to be begotten on the body of the said *Mary* his intended wife, in case of failure of issue male of his body upon the body of the said *Mary*, to be begotten; or if the issue male between them should happen to die, and there should be issue of the body of the said *George Evelyn*, on the body of the said *Mary*, one or more daughter or daughters; he the said *George Evelyn*, by virtue and in pursuance of the powers and authorities to him given, as well by the said recited settlements, as also by virtue of any other powers or authorities to him given, or in him being, did demise, grant and lease, to the respondent *James Worsley*, and the other trustees since deceased, their executors and administrators, all and singular the lands and premises therein before mentioned, and limited to the said *Mary* for her jointure, and all other the manors, lands and hereditaments, in the said recited indentures of settlement comprised and limited to the said *George Evelyn* the younger, for his life; to hold the said premises to the said trustees, their executors and administrators, for the term of 500 years, to commence and take effect from and after the failure of issue male of the body of the said *George Evelyn* the younger, to be begotten, and from thence next ensuing, and fully to be compleat and ended without impeachment of waste; but without any prejudice, and subject to the jointure of the said *Mary* his intended wife; at the yearly rent of a pepper-corn during the said term, at the Feast of *St. Michael* the Archangel, if the same should be demanded; upon the trusts, and for the purposes, and under the provisos therein after mentioned; viz. upon trust, that if there should be failure of issue male of the body of the said *George Evelyn* the younger, on the body of the said *Mary* begotten, and the same *George Evelyn* should have one or more daughter or daughters



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ters of his body, begotten on the body of the said *Mary* his intended wife; that then the said trustees, and the survivor of them, and the executors and administrators of such survivor, should and might, out of the rents, issues and profits of the said messuages, lands, tenements, hereditaments and premises, to them limited for the term of 500 years as aforesaid, or by sale, mortgage, or lease thereof, or of any part or parcel thereof, for all or any part of the said term, or by all or any of the said ways and means, or by any other ways or means, as to them in their discretion should seem meet, as soon as conveniently might be after the decease of the said *George Evelyn* the younger, or in his life-time, if he should think fit to have the same sooner raised, and so direct, levy and raise the sum of 8000*l.* for the portion or portions of such daughter or daughters, to be paid to her or them, and equally divided among them, if more than one, share and share alike: — With a proviso, that the said term of 500 years should in no sort prejudice the jointure; and that immediately after the raising, paying and discharging the said 8000*l.* together with all costs and charges which should be expended in raising the same, the said term should cease and determine.

The marriage took effect, and on the 20th of *June*, 1724, *George Evelyn*, jun. died intestate, without issue male; but leaving *Mary* his widow, and the appellants his only daughters. Whereupon *Mary* the widow (who afterwards married *Charles Boone*, Esq;) procured letters of administration of her said husband *George Evelyn*'s personal estate, and entered on the estates limited to her in jointure; and the respondent *Edward Evelyn*, entered upon the rest of the estate not limited in jointure, but comprised in the said term of 500 years, for raising the daughters portions, and became seised in reversion of the estate limited in jointure on Mrs. *Boone*, after her death, for such estate as was limited to him by virtue of the settlements in *October*, 1698.

In *Michaelmas* term, 1725, the appellants exhibited their bill in Chancery against the respondents, and also against *Thomas Garth*, *James Worsley*, and *Thomas Gregg*, the then surviving trustees in the settlement of *August*, 1720, praying, that the trustees might execute the said trusts, by raising the 8000*l.* in such manner as by the said settlement was directed for the appellants portions; and that the same might be placed out at interest,



and such interest applied for their maintenance. To which bill the defendants *Garth* and *Gregg* put in a joint answer, and the defendant *Garth* thereby submitted to act in the trust; but the defendant *Gregg* desired to be discharged thereof; and the defendant *Worsley* did the same by his answer. But the defendant *Edward Evelyn* insisted by his answer, that this 8,000*l.* was only to be raised out of the rents and profits, when the term came into possession.

Soon afterwards, the respondents *Edward* and *James Evelyn* his son exhibited a cross-bill against the appellants, and against the said *Mary Boone*, the widow and administratrix of the said *George Evelyn jun.* and the trustees, and also against Sir *Thomas Pope Blount*, the mortgagee of the said estates for 1500*l.* in order to have an account of the said *George Evelyn's* personal estate; and that the surplus thereof, after his debts paid, might be applied in exoneration of the said mortgage of 1500*l.* and to have a discovery of the settlements and writings of the family come to the hands of Mrs. *Boone*, after her late husband's death.

These causes being at issue, came on to be heard before the Master of the Rolls, in the absence of the Lord Chancellor, upon the 27th of *May*, 1728; when it was declared, that the power in the deeds of the 20th and 21st of *October*, 1698, was well executed; and it was ordered, that it should be referred to the Master, to enquire into the value of the estate in jointure to the defendant *Mary*, and the value of the estate not in her jointure; and his Honour reserved all further directions, till after the Master's report.

The Master, by his report, dated the 17th of *December*, 1729, stated the yearly value of the estate limited in jointure to amount to 803*l.* a year, for some part whereof the tenants were to pay taxes; and that the annual payments thereout amounted to 4*l.* 15*s.* a year; and that the estate not in jointure amounted to 91*l.* 5*s.* a year only.

Afterwards, the respondents *Edward Evelyn* and *James* his son, apprehending that the declaration which had been inserted in drawing up the decree made by the Master of the Rolls, that the power was well executed, might be construed to mean, not only that the term in the deed of the 22d of *August*, 1720, was



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was well raised, but that the trusts of it were well declared; were advised to prefer their petition of appeal to the Lord Chancellor, against that part of the decree; and they accordingly obtained an order for rehearing both the causes as to that particular, at the same time that they were to be heard on the Master's report for further directions.

The causes came to be heard before the Lord Chancellor *King*, on the 19th and 20th of *July*, 1730; when his Lordship was pleased to desire the assistance of the Lord Chief Justice *Raymond*, and the Master of the Rolls.

And accordingly, on the 26th and 27th of *October* following, the causes were heard before the Lord Chancellor, assisted as aforesaid; when, after a full hearing, the Court declared, they would take time to consider of the matters in question: Which they did, till the 4th of *February*, 1731; when the causes standing in the paper for judgment, the Lord Chancellor, the Lord Chief Justice *Raymond*, and the Master of the Rolls, declared their opinions unanimously, that the 1500*l.* mortgage, being originally a charge on the real estate, the personal estate of *George Evelyn* the son, ought not to be applied to pay off the said mortgage; and that the 8000*l.* claimed by the appellants, ought not to be raised by sale or mortgage of the said term of 500 years, granted by the said settlement of the 22d of *August*, 1720, of the said trust estate, but only out of the rents and profits arising out of the said trust estate; and thereupon it was (among other things) ordered, that so much of the respondents cross-bill as related to the exoneration of the said mortgage on the real, and to have the same paid out of the personal estate, should be dismissed with costs; and decreed, that the said 8000*l.* for the appellants portions, should be raised out of the rents and profits of the trust estate; and the defendant *James Worsley*, the surviving trustee in the settlement, declining to act, the Master was to appoint new trustees; and the defendant *Worsley* was to assign to them, with a power for them to cut down timber from the premises, with the Master's approbation: And the respondent *Edward Evelyn* was to account before the Master, for the rents and profits of the trust estate in his possession; and what upon the balance of such account should appear to have been received by him, he was to pay the same



same to the new trustees, towards satisfaction of the said 8000*l.* and deliver possession of the trust estate to them, and they were to receive the growing rents and profits thereof, and also of the estates in jointure to Mrs. *Boone*, when they should fall in, during the remainder of the said 500 years term, till the remainder of the said 8000*l.* was raised thereout; and all parties were to be paid their costs in the original cause, out of the profits of the trust estate.

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From so much of this decree, as declared that the 8000*l.* ought not to be raised by sale or mortgage of the 500 years term, but only out of the rents and profits of the trust estate, the present appeal was brought; and on behalf of the appellants it was argued, that the 8000*l.* for their portions, became due upon the death of *George Evelyn*, the son, without issue male, and was no more than their mother's portion. That there was no particular method of raising the same, prescribed by the power in the settlement of *October*, 1698, any otherwise than by giving a power to *George* to make leases, without impeachment of waste, for raising portions for daughters; but the settlement did not direct, that these portions should be raised by rents and profits, or in any other particular method, and therefore the trustees were left to do it in the most effectual way; and since no particular method was thereby directed, the methods which were particularly mentioned in the execution of the power, by *George Evelyn*, the son, were very reasonable. That in cases where portions have been expressly directed to be raised by rents and profits of a term for years, Courts of Equity have frequently directed the term to be sold or mortgaged for the raising such portions, especially if they could not be raised in a reasonable time by any other method; and in this case, there being but 9*l.* 5*s.* *per ann.* not covered by the jointure, there was no probability of raising the portions under a great number of years, and but by small sums. That there was no difference between the power in the settlement of the 20th of *October*, 1698, and that of the 21st of *October*, 1698, save only, that in the latter it was added, "that the lease should determine and be void, upon raising the portions;" and from thence it was inferred, that the portions could not be raised by mortgage or sale, because, as soon as the money was paid, the lease would be void. But

C. Talbot.

T. Lutwyche.



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it was hoped, that no such inference could reasonably be made from these words, and that the meaning of them could only be, when the land, or the reversion, had answered the portions; for, if the sale or mortgage was defeated, the portions could not be said to be raised. If, however, this was an objection as to the lands comprised in *that* settlement, it did not hold as to the lands comprised in the *other*, nor prevent the portions from being raised by sale or mortgage of those lands. That the daughters had no maintenance provided for them, and therefore their portions ought to vest, and be immediately raised upon their father's death, without issue male. That portions ought regularly to be raised in entire and gross sums, to answer the end for which they are given; whereas, in the present case, they were decreed to be raised by small sums, out of rents and profits, so that the appellants might be forced to spend the principal for their bare subsistence, and might very probably wait so long, as never to have the real use and benefit of them; which could never be the intention of the marriage agreement, or of the power vested in and executed by their father. It was therefore hoped, that the decree would be varied in the particulars complained of, and that the portions of 8000*l.* with interest for the same, from the time of *George Evelyn's* death, would be directed to be raised by sale of the lands comprised in the 500 years term, or a sufficient part thereof.

P. Yorke.

D. Ryder.

In support of the decree it was contended, that there was no ground to raise these portions by sale or mortgage, either upon the foot of the original powers reserved by the deeds of *October* 1698, or even of the execution of those powers, by the deed of *August* 1720. For, with respect to the jointure lands, which were almost the whole of the estate, the term of 500 years was a mere reversionary term, to take effect after the death of a young jointress; and a sale, or even mortgage of it, at present, (in which case the interest would be adding to the principal during all her life) would, with the 1500*l.* mortgage, possibly swallow up the whole value of the term; and leave only a naked reversion in the heir male, never to take effect in possession, till after the expiration of 500 years, and therefore nothing but the plainest intention of the parties who had

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the absolute power of disposing of this estate, could warrant such a proceeding; but instead of any such apparent intent, a contrary one was manifest upon the very face of the deeds. That the only method prescribed by the deeds of *October* 1698, for raising the portions, was, by making leases without impeachment of waste, the most natural meaning of which was, to raise them out of the rents, or by felling timber; but there were no words which imported, that they should be raised by sale or mortgage, or any general words, which are commonly inserted as words of course, where a general power of raising is intended, and were expressly so in these very settlements, as to the method of raising the sum of 6000*l.* for *George Evelyn* the elder, which was intended to be raised in all events, if he pleased. That in this case there was no particular time appointed when the portions were to be raised, which, therefore, was left to be determined by the nature of the estate, and the necessities of the children. The eldest of the appellants was under five years old when the bill was brought; and it could hardly be imagined, to have been the intent of the grandfather, who was taking so much care to secure a family estate in the male line, that all his care should be defeated, and the estate taken away from the family (as it certainly must, in effect, by a sale or mortgage of this reversionary term) in order to raise portions for granddaughters, who did not yet, and possibly never might want them; and which, if they should happen to die while incapable of disposing of them, or intestate, would go to the mother, or her second husband. That no time being expressly appointed for the payment of these portions, the consideration of the estate from whence they were to arise pointed out the time, *viz.* when that estate naturally furnished a fund for it; that is, when it should come into possession. That by the express words of the proviso in the second settlement of 1698, the term to be created for raising the portions was to cease and determine as soon as the portions were raised; but this could not be, if, after those sums were raised, and the children paid, the term was still to subsist for the benefit of a purchaser or mortgagee; neither was it possible for the term to cease, upon raising the portions in any other sense or way, than by raising them from out of the growing profits: And this proviso was expressly inserted in the settlement of

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1720, and extended to the whole term. Besides, the daughters were not even now unprovided for, for they had two thirds of their father's personal estate, which, by the schedules annexed to the mother's answer, appeared to be considerable; and they would also, on the foot of the decree, as it now stood, have the growing profits of the residue of the estate not in jointure, besides the support and assistance of their mother, who had an ample jointure. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

APPEAL  
dismissed  
by consent.  
Jour. vol. 24.  
p. 280.

AFTER counsel on both sides were partly heard upon this appeal, they informed the House, that all the parties capable of consenting were come to an agreement, and that the same was put into writing and signed by them; and it was submitted to their Lordships, if the same was thought proper, to dismiss the appeal, but without prejudice to the bringing another, in case an act of Parliament could not be obtained, as in the agreement mentioned. Whereupon the written agreement was delivered in and read by the Clerk, as follows:

“ Agreed, that the whole estates comprised in the recovery  
“ and deed of the 20th of *October*, 1698, to lead the uses  
“ thereof, and in the deeds of lease and release of the 20th and  
“ 21st of *October*, 1698, mentioned in the pleadings in this  
“ cause, whereof the greatest part is settled on Mrs. *Boone* in  
“ jointure, and in her possession, and the residue, being 91/  
“ 5s. *per ann.* in the possession of Mr. *Edward Evelyn*, toge-  
“ ther with the advowson of the parish church of *Godstone*, in  
“ the county of *Surry*, be sold to Mr. *Boone* for 24,000*l.* to  
“ be paid as soon as an act of Parliament can be obtained for  
“ confirming this agreement, and proper conveyances of the  
“ said estates to Mr. *Boone* and his heirs, shall be executed by  
“ all proper parties: That out of the said sum of 24,000*l.*  
“ Mr. *Boone* and Mrs. *Boone*, his wife, shall be allowed 8000*l.*  
“ for her jointure, and the appellants shall have 5500*l.* equally  
“ to be divided between them, in satisfaction of their portions  
“ provided by the settlement of the 22d of *August*, 1720,  
“ made on their father and mother's marriage; and the same  
“ shall be placed out on government or real security, for  
“ their benefit during their respective minorities, or until they  
“ shall severally marry, and shall then be paid to them respec-  
“ tively;



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“ tively ; and if all or any of them shall die before her or their  
 “ ages of 21 years and unmarried, the share of such daughter  
 “ or daughters, so happening to die, shall be paid to her or  
 “ their respective executors or administrators : And that the  
 “ sum of 1500*l.* shall be allowed to Mr. *Boone*, for the mort-  
 “ gage made by *George Evelyn*, the appellants grandfather, on  
 “ the said estate, which was vested in Sir *Thomas Pope Blount*  
 “ by mesne assignments, and is now vested in trustees for  
 “ Mr. *Boone* : And that 1000*l.* more of the said 24,000*l.*  
 “ be laid out in lands, and settled on Mr. *Richard Evelyn* for  
 “ life ; with remainder to his first and other sons in tail male ;  
 “ with remainder to *William Glanwill*, Esq; in tail male ;  
 “ with remainder to *Richard Evelyn* the father, and the heirs  
 “ of his body, for his consent to the sale of the said estate ;  
 “ remainder to the said *Edward Evelyn*, and his heirs : That  
 “ the profits of the said lands of 91*l.* 5*s.* per ann. in the  
 “ possession of Mr. *Edward Evelyn* as aforesaid, and which have  
 “ been received by him since the death of the appellants father,  
 “ or which shall be received thereout, till the said sale shall  
 “ be compleated, be applied towards the costs of all parties ;  
 “ and if the same shall not be sufficient for that purpose, that  
 “ so much as shall be wanting shall be paid by the said  
 “ *Edward Evelyn* : And that the residue of the said purchase  
 “ money be invested in a purchase of lands and tenements of  
 “ inheritance, to be settled on the respondent *Edward Evelyn*  
 “ for life ; remainder to trustees to preserve contingent uses ;  
 “ remainder to his first and other sons in tail male ; with such  
 “ remainders over, and under and subject to such powers,  
 “ clauses, provisoes and agreements, as are mentioned and con-  
 “ tained in the said deeds of the 20th and 21st of *October*,  
 “ 1698, touching the said estates, hereby agreed to be sold ; and  
 “ in the mean time, till a proper purchase be found, be placed  
 “ out at interest in the names of trustees, upon trust, to be laid  
 “ out in such purchase as aforesaid, and in the mean time,  
 “ the interest to go to the same uses as the profits of the lands  
 “ to be purchased, ought to be applied : That all parties con-  
 “ cerned, do join in using their best endeavours to procure an  
 “ act of Parliament, for sale of the said estates to the said Mr.  
 “ *Boone*, for the said sum of 24,000*l.* and for applying the said  
 “ 24,000*l.* to the uses and for the purposes aforesaid : That  
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“ in the mean time, application be made to the Right Honour-  
“ able the House of Lords, that the further hearing this cause  
“ upon the appeal, may be adjourned to the next session of  
“ Parliament.”

IT was, however, ORDERED, that the appeal should be dis-  
missed ; but without prejudice to the bringing another, in case  
the said agreement should not be perfected.

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Case 13. *Charles Green,* - - - Appellant.

*Elizabeth Poole*, Executrix of Sir *John* } Respondent.  
*Delavall*, Bart. deceased, - }

1st February, 1733.

SIR *John Delavall* being seised in fee of the manors of  
*Seaton-Delavall* and *Hartley* in the county of *Northumber-*  
*land*, and of the coal mines and collieries there, by indenture,  
dated the 19th of *December*, 1698, demised to *John Ord*, all his  
coal mines and collieries within his said manors and lands  
of *Seaton-Delavall* and *Hartley* ; to hold to the said *John Ord*,  
his executors, &c. from the 19th of *December*, 1698, for the  
term of 31 years ; in which lease there was a covenant from  
the lessee, in these words ; viz.

“ And further also, that he the said *John Ord*, his executors,  
“ administrators and assigns, shall and will now, and from time  
“ to time hereafter, during the continuance of this present  
“ indenture of lease, well and truly pay, or cause to be paid,  
“ unto *Henry Green*, and the other tenants and farmers of the  
“ lands and grounds within the manors of *Hartley* and *Seaton-*  
“ *Delavall* aforesaid, for the time being, such satisfaction and  
“ recompence for damage and spoil of ground done, or here-  
“ after to be done, made or occasioned by the said *John Ord*,  
“ his executors, administrators or assigns, by sinking any new  
“ pit or pits, laying or leading of coals, and making or using  
“ any way or ways, drift or drifts, or doing any other thing,  
“ touching the premisses, as by the judgment of two indifferent  
“ persons shall be thought fit and reasonable ; one whereof to  
“ be



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“ be named by and on the part and behalf of the said *John Ord*,  
 “ his executors, administrators or assigns, and the other of them  
 “ to be named by and on the behalf of the said *Henry Green*,  
 “ or the said other tenants, who shall sustain such damage and  
 “ spoil of ground.”

This lease was made in trust for one *Mr. Rogers*; and *Henry Green*, the appellant's father, was tenant from year to year of all the lands within the manor of *Hartley*, and died so; after whose death, the appellant entered and continued tenant until *November, 1714*; when *Sir John Delavall*, by indenture of lease, dated the 12th of *November, 1714*, demised to the appellant, his executors, &c. all the messuages, tenements, farm-holds, lands and grounds within the said manor of *Hartley*; but with the following exception, viz. “ Except, and always  
 “ reserved unto the said *Sir John Delavall*, his heirs, lessees or  
 “ assigns, all mines and minerals, of what kind soever, in and  
 “ under the said premises, with liberty from time to time,  
 “ and at all times during the said term, for him the said *Sir*  
 “ *John Delavall*, his heirs, lessees or assigns, to dig, sink, and  
 “ make pit and pits in the said premises, and to manage and  
 “ carry on the same, and all those already sunk and won, to  
 “ lead and carry away the coals to be gotten forth and out of  
 “ the same, and also to make pit-rooms, build hovels and  
 “ lodges, and to lay waggon-ways, and to repair the same;  
 “ and to do every other act and thing convenient and necessary  
 “ in and about the same; he the said *Sir John Delavall*, his  
 “ heirs, lessees or assigns, paying and allowing such reasonable  
 “ satisfaction for damages and spoil of ground, as is and are men-  
 “ tioned and agreed, and set down in the indentures of lease of the  
 “ said coal mines, granted by the said *Sir John Delavall* to *John*  
 “ *Rogers, Esq;* deceased, or some in trust for him, and under  
 “ which the said collieries are now held and enjoyed.” To hold  
 the same (except as before excepted) to the appellant, his  
 executors, administrators and assigns, from *May-day 1715*, for  
 21 years, at and under the yearly rent of 325*l.* payable at *May-*  
*day* and *Martinmas*, by equal portions. — And it was by this  
 indenture also agreed, that the appellant, his executors, &c.  
 should, during the term, uphold and keep the roofs and covers  
 of the houses belonging to the demised premises, which were  
 then



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then covered with thatch, well covered and water tight, and all the hedges, gates and stiles, in good and tenantable repair; and that Sir *John Delavall*, his heirs and assigns, on their part, should keep in repair all the walls and timber belonging to the roofs of such houses.

Soon after the execution of the colliery lease, Mr. *Rogers*, for whom Mr. *Ord* was trustee, entered and wrought the collieries; and after his death, Mr. *Rogers*, his son, as his devisee or administrator, in the year 1725, determined the lease, according to a power therein; and from that time Sir *John Delavall* entered and wrought the collieries, until the 4th of June, 1729, when he died; having first made his will, and thereof appointed the respondent executrix and residuary legatee.

Mr. *Rogers* dying in November, 1709, and his son continuing to work the colliery till Michaelmas, 1725, the appellant, from time to time, applied to him and his agents for satisfaction for spoil of ground, and proper persons were appointed by each of them, to view and settle the damages; but the persons so named could not agree in their estimates till Michaelmas, 1720, when a general estimate was made from Michaelmas, 1708, to that time, at 130*l.* 10*s.* which the appellant refused to accept, tho' Mr. *Rogers*, the son, was content to pay the same.

Mr. *Rogers*, the son, was always willing to pay the appellant what should be settled for damages, according to Mr. *Ord*'s covenant; but the appellant, being dissatisfied therewith, applied to Sir *John Delavall*, and, at his request, Mr. *Rogers*, the son, and the appellant again appointed persons to make an estimate, but they could not then agree; yet the appellant, from time to time, received coals of Mr. *Rogers* to the amount of 200*l.* and upwards, on account of damages, and Sir *John*, during the continuance of the colliery lease, never apprehended himself liable to make any satisfaction whatsoever for damages or spoil of ground, nor did the appellant ever demand satisfaction of him.

The appellant being half a year's rent in arrear to Sir *John* at his death, amounting to 162*l.* 10*s.* he, without making any demand on the respondent for damages, immediately afterwards filed his bill in the Court of Exchequer against the  
respond-



respondent, for a discovery of the assets of Sir John; and that the respondent might come to an account, and make him satisfaction not only for damages for spoil of ground, during the time Sir John Delavall wrought the colliery, but also for all the time the same was wrought by Mr. Rogers; and for satisfaction for several houses, part of his farm, which he suggested, Sir John suffered to fall down for want of reparation in the walls and timber: And the bill also prayed an injunction, to stay the respondent from proceeding against him at law for the rent in arrear, and for coals which he had received from Sir John.

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The respondent by her answer insisted, that she, or Sir John Delavall, were not liable to make the appellant any satisfaction for spoil of ground during the continuance of the colliery lease to Mr. Ord; and that she believed the appellant, either did receive satisfaction from Mr. Rogers, or might have received the same if his demands had been reasonable; she admitted assets of Sir John Delavall, and offered to appoint an indifferent person, if the appellant would appoint another on his side, to adjust the damages during the time Sir John wrought the colliery, and to pay in money what should be so adjusted, to prevent further litigation or taking any account; but insisted, that if the houses became ruinous, it was through the appellant's own neglect to repair them in thatch, and to keep them water tight.

On the 9th of November, 1732, the cause was heard; when the counsel for the respondent objected, that the appellant wanted proper parties; for that he ought to have made Mr. Rogers, the son, and the executors of Mr. Ord, parties to his bill, and that the appellant's remedy, if any, was at law; and insisted on several other matters, as reasons for dismissing the appellant's bill; whereupon, and on hearing the appellant's counsel, and upon reading the colliery lease made to Mr. Ord, and the lease of the lands to the appellant; the Court ordered and adjudged, that the appellant's bill should be dismissed with costs.

From this order of dismissal the present appeal was brought; and on behalf of the appellant it was argued, that Sir John Delavall, by his lease, expressly agreed to pay and allow to the

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appellant such reasonable satisfaction, for damages and spoil of ground, as were mentioned in the lease of the coal mines, and thereby made himself immediately liable to make the appellant satisfaction; and these damages, as well during the time that Sir *John* wrought the colliery himself, as while the same was wrought under the lease, amounted to a very considerable sum. That the agreement under which the appellant was entitled to such satisfaction, being made with Sir *John Delavall* only, and the lessees of the colliery not being parties, or privy thereto, it was not necessary to make the executors either of *Ord*, or *Rogers* parties to the bill, and the doing of it might have subjected the appellant to the payment of their costs; but if it was really necessary to have the executors of *Ord* and *Rogers*, or either of them, parties, it was apprehended, that the Court ought to have directed, that the appellant, on payment of the usual costs, might have been at liberty to amend his bill by adding parties; and not, upon the making of an objection for want of such parties, to dismiss the bill absolutely with costs; that being the usual direction in Courts of Equity, when it appears at the hearing of a cause, that proper parties are wanting. That there could be no reason to dismiss the bill for want of parties, touching so much of the appellant's demand as arose during the time that Sir *John Delavall* himself continued to work the mines, which was from the 29th of September, 1725, till his death in June, 1729; and yet the dismissal was general, and the appellant was thereby precluded from bringing a new bill for a satisfaction, at least during that time. That Sir *John*, by his lease to the appellant, agreed to keep in repair, during the term, all the walls of the houses, and all the timber belonging to the roofs of such houses; and it was fully proved in the cause, that Sir *John* did not perform that part of the agreement, but that, for want of his repairing the houses, several of them fell down and became ruinous, to the great loss and damage of the appellant, who was under the necessity of laying out considerable sums in repairing the walls and timbers of others of the houses, which should have been repaired by Sir *John Delavall*; and yet, if this order of dismissal should stand, the appellant would be deprived of all satisfaction for the loss he had sustained by the want of repairs, and of having any allowance for the money he had expended in the making repairs: And therefore it was prayed, that the said order might be reversed.



On the other side it was contended, that the appellant had a legal remedy against Sir *John Delavall*, and against the respondent as his executrix, upon his covenant for repairing the walls and timber which supported the roofs of the houses, in case the same had been out of repair by Sir *John's* neglect; and therefore the appellant ought not to have come into a Court of Equity, to seek a satisfaction for such damages. That he had also the same remedy against the respondent, for damages for the spoil of his ground, during the time that Sir *John* wrought the colliery; and both Sir *John* and the respondent were always ready to make him such satisfaction for the same, as should be ascertained by two indifferent persons, according to the agreement in the appellant's lease; but which he had not offered by his bill, or prayed that the same might be done. That by virtue of the clause in that lease, the appellant might have recovered satisfaction against Mr. *Ord* and his representatives, for damages and spoil of his ground, during all the time that the colliery was wrought under Mr. *Ord's* lease: And as Mr. *Rogers* and his son, who did those damages, and were the *cestui que* trusts of Mr. *Ord*, were answerable for them; so the appellant made his election to receive damages from Mr. *Rogers* and his son, and actually received from them a satisfaction for part of those damages; and therefore, he ought to have made *Rogers* the son, who with his father had committed the spoil, and the representatives of Mr. *Ord*, who had covenanted to make satisfaction, parties to this suit; whereby the Court might have been able to decree, from whom the appellant should receive satisfaction; the respondent being only answerable from the time of Sir *John's* entry. It was therefore hoped, that the order of dismissal would be affirmed, and the appeal dismissed with costs.

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BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed; and that the appellant should be at liberty to amend his bill, by adding proper parties, on paying the costs of the day in the Court of Exchequer.

ORDER  
reversed,  
Jour. vol. 24.  
P. 337.

*John*



Case 14. *John Vernon, Esq; Thomas Begg, Hugh Begg, John Maxfield, John Keating, Michael St. Lawrence, John Waring, Jun. Ann Edwards, Jane Gaffney, Elizabeth Gallagher, Mary Bath and Hester Bath,* } Appellants.

The Lord Mayor, Sheriffs, Commons, and Citizens of the City of *Dublin*, } Respondents.  
and Alderman *Humphry French*,

4th February, 1733.

THE respondents, the Lord Mayor, Sheriffs, Commons, and Citizens of *Dublin*, being seised in fee of a large tract of ground or strand, called *Crablough*, situate within the liberties of the city, and containing about 195 acres; by indenture under their common seal, dated the 18th of *July*, 1718, granted the respondent Alderman *French*, his executors, administrators and assigns, absolute power, licence and authority, from time to time, and at all times, from and after the 25th day of *March* then next ensuing, for the term of 61 years, to lay down and take up oysters on the said piece of ground; and for which grant, or licence, Alderman *French* was to pay 70*l. per ann.*

The respondent Alderman *French*, by virtue of this grant, entered on the premises, and was at a very considerable expence in making oyster-beds thereon; and he, and those deriving under him, for several years peaceably and quietly enjoyed the sole property and benefit of laying down and bedding oysters on the said ground, and of taking away and disposing thereof at his and their pleasure: But the appellant *Vernon* pretending some right or title to the said piece of ground or strand, he, in the month of *May*, 1729, laid down and bedded oysters on some part thereof; and frequently, within three months before filing the bill after mentioned, caused some of the oysters belonging to the respondent *French*, and his under-tenants, to be



be carried away and disposed of as he thought fit; and the respondent *French* sending to the appellant *Vernon*, and desiring to know what he meant by so doing, and to forbid him from doing the like again, he returned for answer, that he would take oysters off the premises as often as he pleased, and that he would destroy all the oysters belonging to the respondent *French*, and those deriving under him: And accordingly, the appellant *Vernon*, with the other appellants, and several other persons, on the 26th of *June*, 1729, in a forcible and riotous manner, entered on the premises, and carried away large quantities of the respondent's oysters, and caused them to be burned; the appellant *Vernon* declaring that he would, from time to time, continue to do so.

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In consequence of this conduct, the respondents, on the 1st of *July*, 1729, according to an ancient usage or course of proceeding in *Ireland*, founded on the equity of the statutes made against forcible entries, exhibited their bill in the Court of Chancery there, against the appellants, praying an injunction to quiet them in the possession of the premises, till evicted by due course of law: And the respondents having petitioned the Lord Chancellor, setting forth the substance of their bill, and praying the usual injunction in cases of force on a triennial possession, and having annexed proper affidavits to their said petition, to prove the said forcible disturbances; and that the respondents, the corporation of the city of *Dublin*, and their predecessors, for fifty years past and upwards, by themselves and their under-tenants, and particularly for ten years before the filing of the bill, had been in the actual quiet and peaceable possession of the premises, except the disturbances so given them by the appellants; it was, on the 2d of *July*, 1729, ordered, that an injunction should issue, directed to the appellants for quieting the respondents, their under-tenants and assigns, in the actual possession of the premises, till they should be thereout evicted by due course of law, or till further order of the Court to the contrary.

An injunction issued accordingly, and the appellants being served therewith, they all thought fit to appear, as in contempt, on an attachment, and submitted to be examined on personal interrogatories, touching the matters alledged in the bill, though



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none of them needed to have appeared but the appellant *Vernon*, who only contested the possession of the premises; nor could the other appellants have been prejudiced by their not appearing: However, when they all appeared, it became necessary for the respondents to exhibit personal interrogatories against them; for otherwise the appellants, by the course of the Court, would have been dismissed with costs against the respondents.

Personal interrogatories being accordingly exhibited, the appellants put in their answers thereto; and the appellant *Vernon*, in his answer, insisted, that the said strand was part of the manor of *Clontarf*, and that it lay in the county of *Dublin*, and was part of the estate of *Mary Vernon*, under whom he claimed; but admitted, that the corporation of *Dublin* had of late set up some claim thereto, as being in the liberty of the said city, and believed, that the corporation every third year rode round the franchises or precincts of the city, to preserve the bounds thereof; and that the custom of riding on the north side of the river beyond *Ballybough-Bridge*, (by which all the said strand called *Crablough*, was by them taken in) began about 50 years before; but said, they sometimes met with interruption therein from the Lords of the manor of *Clontarf*: He also insisted, that a part of the said strand by him called *Quire's Island*, lying within the bounds described by the bill, and whereon he had laid down oysters, never was in the possession of the city, or used by any other person, except the said *Mary Vernon's* tenants; and that she, and those deriving under her, for 18 years past, had salt pipes laid on the strand below high water mark, for the use of the salt works of *Clontarf*; he admitted, that the city of *Dublin* granted to the respondent *French*, liberty to bed and feed oysters on the premises for 10 or 11 years before, at some yearly rent; that the respondent *French*, and others by his direction, laid down large quantities of oysters thereon, and made profit thereof; but denied, that the respondent *French*, or those deriving under him, solely enjoyed the premises; the said *Mary Vernon's* tenants having, as he insisted, constantly fished thereon for oysters, and other shell-fish; and he admitted, that he and the other appellants entered on the premises, but without force, and that he caused four tumbrils of the respondent *French's* oysters to be roasted and eaten; and that he turned one of the respondent *French's* servants off the



the premisses, and declared he would use all his servants so; and confessed, that the other appellants entered on the premisses by his order, with intent to assert the said *Mary Vernon's* right.

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The appellant *Vernon* having denied the force and the respondents quiet possession, it became necessary to examine witnesses touching those points; and accordingly, both parties having proceeded to examine witnesses, the appellant *Vernon*, on the 22d of *October*, 1729, obtained an order for examining the other appellants as witnesses for him, saving just exceptions; and, on the 19th of *November* following, after several of his witnesses had been examined, he obtained an order for exhibiting additional interrogatories.

On the 28th of the same month, the appellant *Vernon* moved the Court for liberty to take away, and dispose of the oysters he had laid down on that part of the strand called *Quire's Island*; and which was ordered accordingly, on his giving security by recognizance, to abide by such order or decree as should be made on the hearing of the cause: And it was further ordered, that he should take away all the said oysters before the 25th of *March* then next ensuing; and that he, or those employed by him in carrying away the said oysters, should not pass or re-pass over the respondent *French's* oyster-beds. And it was thereby declared, that the appellants entering on the premisses, to carry away the said oysters, was not to prejudice the possession of the respondents, or the injunction issued in the cause; and the appellant *Vernon* was not to lay down any more oysters, than he had already laid down on the premisses. In pursuance of this order the appellant *Vernon* gave security, and carried away the oysters.

Both parties having examined their witnesses, and publication having passed; the Court, on the 6th of *June*, 1730, referred it to Dr. *Stanton*, one of the Masters, to inspect the personal interrogatories exhibited by the respondents, the answers of the appellants thereto, and the depositions of witnesses taken in the cause; and he was to certify to the Court how he should find the matter, and whether the appellants were guilty of the contempt laid to their charge or not.

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Soon afterwards, the appellant *Vernon* moved the Court for liberty to prove, before the Master, copies of several charters, patents, and many other deeds and exhibits; which was ordered accordingly, saving to the respondents all just exceptions. And on the appellants motion, the Court, on the 10th of *November*, 1730, ordered, that the Master should be armed with a commission to examine such witnesses as should be produced before him, as to the contempt referred to him.

The Master, on the 6th of *July*, 1731, made his report, and therein stated the substance of the proofs on both sides; and though it manifestly appeared, by the depositions of several credible witnesses, that the respondent Alderman *French*, and those deriving under him, had been, for above nine years before the filing of the respondents bill, in the quiet and peaceable possession of the said strand called *Crablough* (except the interruption given them by the appellants) and that he and they, during that time, enjoyed the sole liberty of laying down and feeding oysters thereon, and of carrying away and disposing of them as they thought fit; and, notwithstanding that no sufficient evidence appeared on the part of the appellants, to contradict the same; yet the Master was pleased to conclude his report with saying, that the appellants proved and laid before him several patents and other records, to make the appellants title to the strand in question appear, and to shew the precincts of the city of *Dublin*: But the respondents counsel insisting, that the possession for three years before filing the bill, was the single question before the Court, and not the title; and the proofs so stated in his report differing, in several points, he could not take upon him to certify, whether the appellants were guilty of the contempt laid to their charge or not; but submitted the whole matter to the Court.

To this report, each party took five several exceptions; and the cause coming on to be heard upon the report and exceptions on the 8th, 9th 10th and 11th of *December*, and the 21st and 22d of *January*, 1731, before the Lord Chancellor of *Ireland*; his Lordship was pleased to allow the appellants first and second exceptions; and the substance of the appellants third exception being, for that the Master reported, that the appellants had laid before him several copies of patents and other records,



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records, to make his title to the strand in question appear, but did not report what appeared by such patents or records; and the appellant's fourth exception being, for that the Master did not report that there were several positive witnesses who deposed, that *Crablough* lay in the manor and parish of *Clontarf*, and county of *Dublin*; and his fifth exception being, for that the Master reported, that about 18 years ago, pipes were laid by the said *Mary Vernon* on the said strand, but not on that part called *Crablough*, but did not report, that the said pipes were laid on part of the ground, in the possession of which the respondents, by their bill, prayed to be quieted; his Lordship was pleased to over-rule the said three last exceptions, and thought fit to allow the respondents first exception, and to over-rule their second exception: And the substance of the respondents third exception being, for that the Master stated in his report several depositions taken on the part of the appellants to an additional interrogatory, which was leading in material points; and for that the said interrogatory tended to examine matters contained in the original interrogatories, and that therefore, the said depositions ought not to be read; and more particularly the depositions of one *Edwards* and one *Gallagher*, who were examined to the original and additional interrogatories at different times: On arguing this exception, his Lordship was pleased to declare, that the witnesses examined on additional interrogatories, at a different time from their examination on the original interrogatories, were irregularly examined; no order having been made for that purpose, as there ought to have been, and that grounded on an affidavit, that the appellants did not know, at the time of the examination of the said witnesses to the original interrogatories, that they were witnesses proper to be examined to the matters contained in the additional interrogatories; and therefore allowed that part of the exception, but over-ruled the remainder: And the substance of the respondents fourth exception being, for that the Master received and reported the depositions of *Hester Bath* and *Michael St. Lawrence*, two of the defendants in the cause, tho' objected to, his Lordship was pleased to allow that exception also; and the respondents fifth exception being, that the Master did not report the appellants guilty of the contempt laid to their charge, the consideration of that point was reserved to the final determination of the cause; and pursuant to the before mentioned



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variations, he proceeded to hear the cause. And on the 3d of *March*, 1731, was pleased to declare, that there seemed to him to be a contrariety in the evidence, and desired to know, from the practicers of the Court, not concerned in the cause, whether it was the course of the Court, in such cases, to direct an issue to try the matter of the possession; and being informed it was, his Lordship directed the following issue to be tried the then next *Easter* term, by a jury of the county of *Dublin*, viz.

“ Whether the respondents, or any deriving under them, were,  
 “ for three years next before the filing of the bill, in the  
 “ quiet and peaceable possession (save the disturbance complain-  
 “ ed of in the bill) of any and what part of the lands called  
 “ *Crablough*, mentioned in the lease made to the respondent  
 “ Alderman *French* by the city of *Dublin*, and in which the  
 “ disturbance complained of, was given :” And each party was to be at liberty, on the trial, to give in evidence the depositions of such witnesses taken in the cause, as by reason of death, or any other lawful cause, to be made appear by affidavit, could not be present at the said trial; and the Judge was to certify the verdict, and then the Court would make such further order as should be fit; and his Lordship was pleased to declare, that if either party thought fit to move to have another county appointed for the trial, on application, such order should be made as would be fit.

Accordingly, the respondents applied to the Court by petition; praying, that the said issue might be tried by a jury of any indifferent neighbouring county; whereupon, and in as much as the appellants did not oppose the changing of the county, it was ordered, that the said issue should be tried by a jury of the county of *Kildare*, being the next adjoining indifferent county.

J. Willes.

D. Ryder.

From all these orders, the present appeal was brought; and on behalf of the appellants it was said to appear, by the respondents own shewing, that there were not proper parties before the Court, they having suggested, by their bill, that the respondent *French*, and those deriving under him, were in possession of the premises; and those who derived under *French*, not being parties, the bill ought to have been dismissed; since it thereby appeared, that others, not parties, were equally entitled to have an injunction to be quieted in the possession of the premises :



premises: Besides, bills of this kind must alledge and prove the sole and actual possession to be in the plaintiffs, who prefer them, and that no ownership or possession is in any body else. That the practice of the Court of Chancery in *Ireland*, in granting injunctions on these sort of bills, is founded merely on the equity of the statute of *Henry VI.* respecting forcible entries; and as the appellants, by their answer, had denied all force, and none had been proved in the cause, the present case was not within the reason of that practice. That the respondents, who sought to be quieted on account of three years possession, should at least have proved, that they had the sole, quiet and peaceable possession of the whole *Strand* and premises in question for three years immediately before the disturbance complained of, by a title existing and undetermined; but in all this they had entirely failed. That the respondents sought to be quieted in the whole *Strand*, under one single denomination of *Crablough*, containing in the whole 195 acres, whereas it was fully proved in the cause, that the land within the boundaries described by the bill, and therein called *Crablough*, consisted of grounds of several different denominations; and that the appellant *Vernon*, and those from whom he derived, had been in the sole, quiet and peaceable possession of much the greatest part thereof; and therefore the respondents could not be quieted, according to the prayer of their bill, because that would be to turn the appellant out of possession. And as to the residue of the land, viz. what was properly called *Crablough*, being about six acres, tho' it appeared that the respondent *French* and his partners, did lay down and take oysters therefrom; it also appeared, that the appellant *Vernon* and the tenants and servants of *Mary Vernon*, did the same; and that they solely received anchorage, wreck and salvage, which was the highest evidence both of title and possession; and that they also received payments for every boat landing fish on the soil, and took cockles, muscles and oysters off *Crablough*, and disposed of the same under *Mary Vernon's* title; so that the respondents had failed in any proof of a sole, quiet and uninterrupted possession in any part of the lands in question. That it thus appearing, that on this small part of the premises, the appellant *Vernon* and the respondent had a mixed possession, no presumption in law would arise from such a possession, to whom the same belonged;



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belonged; and where two persons are in possession, the law determines the possession in him to whom the real right belongs, and therefore the appellant should have been permitted to have read the deeds and instruments proved in the cause relating to the title; more especially, as the respondents themselves had interrogated and examined thereto. That the respondents having, by their bill, charged a special title of a feisin in fee and possession, time out of mind, in them of the premises in question, and described them as lying within the liberties of the county of the city of *Dublin*, and the appellants having, by their answer, denied any such title, and insisted, that the premises lay in the county of *Dublin* at large, the title of both parties was thereby put in issue; and therefore the appellant *Vernon* ought to have been permitted to read the evidence of his own title, especially as the respondents were permitted to read the lease granted to *French*, as evidence of their title. That no issue should have been directed in this case, it appearing clearly in proof, that the respondents were not in the quiet and peaceable possession of the premises, but in a mixed or disputed possession, which could only be determined by a trial of the right; and therefore a Court of Equity ought not to interpose by a bill of this kind, but leave the parties at liberty to dispute the right at law. Besides, it was conceived to be highly unreasonable, to direct an issue to be tried only as to the possession for three years, which could not in the least tend to determine the right between the parties; but the respondents ought to have been left to their remedy in the ordinary course of law, either by an ejectment, or by an action grounded on the statute of forcible entries. That the appellants fourth and fifth exceptions, were merely on account of the Master's not having stated the evidence according to the depositions of the witnesses; on reading whereof it would plainly appear, that both these exceptions ought to have been allowed, as they went to very material points of the case. The fourth exception being to shew, that the lands in question lay in a different county from that charged by the bill, and that the appellant *Vernon* had actual possession thereof, in the instance of laying down the salt pipes. That the third exception of the respondents ought to have been over-ruled, because they cross-examined the two witnesses, whose depositions, they insisted by this exception,



exception, ought not to have been read; but, besides that, the additional interrogatories were touching different matters from those contained in the original interrogatories, and the appellants had obtained an order for exhibiting them. And the respondents fourth exception ought likewise to have been over-ruled, it being the constant practice of all Courts of Equity, to read the depositions of such defendants as appear disinterested in the matters in question, provided an order is first obtained for their examination; and the reason and justice of the case requires it should be so, as otherwise, a plaintiff might deprive a defendant of all his material witnesses, by making them parties to his bill; which was plainly the view of the respondents in the present case, by making the tenants parties, who were able to prove the appellant *Vernon's* possession, and had no interest in the dispute. It was therefore prayed, that the several orders appealed from, might be reversed; that the respondents bill might be dismissed with costs; and that the recognizance entered into by the appellant *Vernon* and his sureties, pursuant to the order of the 28th of *November*, 1729, might be vacated.

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On the other side it was insisted, that the order of the 28th of *November*, 1729, was made upon the appellant *Vernon's* own application, and with his consent, given in open court; that he submitted to it, and enjoyed the full benefit of it, by carrying off all his oysters within the time thereby limited; and that there was no colour for saying, that the possession was in any sort altered or transferred by this order; for the injunction contended for in this case, was not for restoring or transferring possession, but barely for quieting the respondents in such possession as they had at the time of filing their bill, or for three years before any disturbance given, until the possession should be evicted by due course of law. That it is the constant and known practice of the Courts of Equity in *Ireland*, on bills of this nature, not to meddle with the title, that being properly cognizable at common law; but merely to examine whether the plaintiffs have been in quiet possession for three years before the disturbance given, and to enquire into the nature and circumstances of such disturbance, and who the disturbers are; and therefore, in the present case, the patents, charters and other exhibits, relating to the title set up by the appellant *Vernon*, were wholly foreign to the matter

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N. Fazakerley.



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properly under the consideration of the Court. Besides, he did not set up, or prove any title in himself, for by his answer to the personal interrogatories, he owned, that he and the other appellants gave the disturbances before mentioned, in order to assert Mrs. *Mary Vernon's* title, but he had not attempted to shew any authority from her for so doing; and she not being an actual disturber, the respondents could not regularly have made her a party to their bill; nor did they examine to their title, it being improper to do so on bills of this nature. That it appeared fully in proof in the cause, that the respondent *French*, and those deriving under him, had, for above nine years before the filing of the bill, been in the quiet and peaceable possession of the strand, called *Crablough*, save the disturbance given by the appellants; and had, during that time, enjoyed the sole liberty of laying down and feeding oysters thereon, by virtue of the grant or lease made by the corporation: And it appeared on the face of that grant, that the respondent *French* was the only person interested in the liberty, profit and privilege thereby granted; and therefore the Court ought to have decreed, that the respondents should be quieted in their said possession, till evicted by due course of law. So that upon the whole matter, the issue directed to be tried, was more in favour of the appellants, than of the respondents. That the respondents bill and injunction was not solely for the possession of the soil of the strand, called *Crablough*, but also for the quiet exercise of certain liberties and privileges thereon, without which no profit could be made of the soil; and if it appeared, that the appellants disturbed the respondents in the free enjoyment of that liberty, on any part of the strand comprised in the grant or lease, the appellants were to be deemed in contempt for so much, and the respondents were entitled to an injunction to quiet them in the possession of that part; and by the trial of the issue directed, it would appear, what part of the strand, called *Crablough*, the respondents were in the quiet possession of for three years before the filing of the bill. That the appellants *Michael St. Lawrence* and *Hester Bath*, having been properly made defendants to the suit, there was no colour for reading or reporting their depositions, which was the matter of the respondents fourth exception. There was as little colour for reading the depositions of *Edwards* and *Gallagher*, to the  
appel-



appellants additional interrogatories, which was the matter of the respondents third exception; for these witnesses having been first examined to the appellants original interrogatories, they could not afterwards regularly be examined to the additional interrogatories, without a special order, grounded on an affidavit, that at the time of examining those witnesses to the original interrogatories, the appellants did not know they were proper witnesses to be examined to the additional interrogatories; but no such order or affidavit was made. It was therefore hoped, that the orders, so far as they were complained of by the appellants, would be affirmed; and the appeal dismissed with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders complained of, should be reversed; and that the respondents bill should be dismissed, and the injunction dissolved; and that the recognizance before mentioned should be vacated.

ORDERS  
reversed.  
Jour. vol. 24.  
P. 338.

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The Most Noble *Scroop*, Duke of } Appellant. Case 15.  
*Bridgewater*, - - -

Sir *Francis Edwards*, Bart. - Respondent.

27th February, 1733.

THE appellant and his ancestors were Lords of the manor of *Middle* in the county of *Salop*, and entitled to receive several small rents or services from the tenants of the said manor; and particularly, a rent of 7s. a year from the respondent and his ancestors, or those whose estate he had, which rent was issuing out of lands in *Houlston*, a village or hamlet within the manor, belonging to the respondent.

This rent having been neglected to be paid for several years, and the respondent having been applied to, but refusing to pay the same; the appellant, in *Easter* term, 1731, exhibited his bill in the Court of Exchequer against the respondent, setting forth his title to the said rent, and that the same had been paid by the ancestors of the respondent, or their tenants, and particularly



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ticularly by *James Fewtrel* and *Margaret Fewtrel*, his widow, on behalf of the respondent or his ancestors, but that the respondent refused to pay the same. And in regard the appellant could not discover what part of the respondent's lands were chargeable with the said rent, so as to distrain, or otherwise recover the same at law; the bill prayed a discovery out of what lands the said rent issued, and also an account of the rent and the arrears thereof, and that the appellant's right thereto might be established.

The respondent, by his answer to this bill, admitted, that the appellant was Lord of the manor of *Middle*, and that he was entitled to several rents from the tenants there; but denied that the appellant or his ancestors, to his knowledge or belief, had ever had or received, or been entitled to the said rent of 7s. or that the same had been paid by the respondent, or his ancestors. — He admitted, that he was seised of divers lands in *Houlston*, but denied that the same were held of the manor of *Middle*, or that any of the tenants of the said lands of the name of *Fewtrel*, did ever pay the said rent to the appellant; and insisted, that in case the appellant had any right or title to the said rent, he might have his remedy at law for the same.

Issue being joined in the cause, divers witnesses were examined, and the same was heard on the 5th of *July*, 1732; when the Court, without hearing any proofs read, were pleased to decree, that the appellant's bill should be dismissed with costs.

J. Willes.  
D. Ryder.

From this decree of dismissal the Duke appealed; and on his behalf it was argued, that chief rents commencing time beyond memory, by great length of time it frequently becomes impossible to know out of what particular lands they issue, but which is necessary to be proved in a course of proceeding at law, to recover such rents; and therefore such remedy is exceeding difficult and tedious, and in most cases absolutely impracticable: For which reason, and that there may not be a right without a remedy, Courts of Equity have for a long series of time exercised a jurisdiction in cases of this nature; and have constantly, where there has been proof of payment made within a reasonable time, decreed a satisfaction of all arrears of such rents,



rents, and payment of the same for the future: And if in these cases, Courts of Equity were to deny relief, many rents of this kind, though indisputably due, would be irrecoverable and entirely lost. That the appellant had suggested by his bill, that he could not discover what part of the lands was chargeable with the rent, so as to distrain for, or recover the same at law; and had made proof in the cause, both by the depositions of witnesses, and by ancient rentals, that the said rent had been constantly paid for many years by the tenants of the respondent's ancestors, to the ancestors of the appellant, until about the year 1710. If it should be objected, that these proofs are not mentioned in the decree to have been read, nor ordered to be entered as read; it may be answered, that the Court did not dismiss the bill upon any defect in the proofs, but because they were of opinion that they had no jurisdiction, and could not give the appellant any relief, even though his case had been made out as stated in the bill, and therefore there were no proofs read; and it is the usual method of that Court, not to permit any proofs to be entered as read, but what are actually read at the hearing. The appellant therefore hoped, that he should either be permitted to read his proofs at the hearing of the appeal, although they were not read, or entered as read, in the Court of Exchequer; or, that the Court should be directed to enter into the examination of the facts contained in the appellant's bill, and in that case, that the decree of dismissal would be reversed.

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For the respondent it was only said, that the appellant had not evidence to support his pretended demand; and that if there was sufficient evidence of it, there was nothing appearing in the cause, which made it necessary to come into a Court of Equity; but that the matter might as well have been determined at law, and would have been attended with much less expence.

T. Lutwyche.  
N. Fazakerly.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the Court of Exchequer should proceed to hear the cause upon the pleadings and proofs.

DECREE  
reversed.  
Jour. vol. 24.  
p. 360.



## Cases in Parliament.

Case 16. *Henry Tasburgh, Esq; and George M<sup>c</sup> Nemara, Gent.* } Appellants.

*Sir Robert Echlin, Bart. Thomas Tickle, Esq; and Clotilda his Wife, and Chetwood Eustace, Esq;* } Respondents.

9th March, 1733.

**K**ING *James I.* by his letters patent under the Great Seal of *Ireland*, dated the 17th of *June*, 1608, granted the dissolved abbey or monastery of the canons of *Cong*, in the county of *Mayo*, with the lands, tenements and appurtenances thereunto belonging, and several vicarages, rectories, tithes and lands, which were part of the possessions of the said abbey before the dissolution thereof, to *John King* and *John Bingley*, and their assigns, for 116 years, to commence from the 18th of *May* then last past, at the yearly rent of 28*l.* 17*s.* 4*d.* The residue of which term, by deed, dated the 26th of *May*, 1667, became vested in *John Tasburgh*, father of the appellant *Henry*.

King *Charles I.* by his letters patent dated the 25th of *March*, 1647, granted the same premises to *Sir Maurice Eustace*, Knt. and his heirs, at the like yearly rent of 28*l.* 17*s.* 4*d.* but without reciting, or taking any notice of the said term of 116 years.

*Sir Maurice Eustace*, by his will, dated the 20th of *June*, 1665, devised the premises, *inter alia*, to his nephew *Sir John Eustace* in fee; who, by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the said term of 116 years.

The premises being only of the clear yearly value of 200*l.* *Sir John Eustace*, in consideration of 200*l.* paid him by the said *John Tasburgh*, did, by indentures of lease and release, dated the 30th and 31st of *May*, 1681, grant and convey the same to *Charles Tasburgh*, Esq; and his heirs, in trust for the said *John Tasburgh*; in which indenture of release there was

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a proviso to the following effect; viz. That if the said Sir *John Eustace*, his heirs, executors, or administrators, should pay to the said *Charles Tasburgh*, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the said indenture of release, the sum of 200*l.* of current money of *England*, with full interest for the same, at the rate of 10*l.* per cent. per ann. according to the custom of the kingdom of *Ireland*; that then it should be lawful for the said Sir *John Eustace* and his heirs, into the premisses to re-enter, and the same to re-possess and enjoy as in his and their former right: But if the said Sir *John Eustace*, his heirs, executors, or administrators, should fail in payment of the said sum, with interest at the time limited, that then the estate of the said *Charles Tasburgh* should be absolute and indefeasible, as well in equity as at law; and that the said Sir *John Eustace*, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said indenture of release: And the said Sir *John Eustace* did thereby, for himself and his heirs, release unto the said *Charles Tasburgh*, his heirs and assigns, for ever, all his right in equity to redeem the premisses, in case of failure of payment as aforesaid: And this conveyance being intended as a conditional purchase, there was no covenant therein, on the part of the grantor, to repay the 200*l.* or the interest thereof, as is usual in all mortgages.

The five years mentioned in the proviso being elapsed, and no part of the 200*l.* or the interest thereof, having been paid; and *John Tasburgh* having no remedy at law to compel the payment, the estate which passed by the release being only a reversion, expectant on the determination of a term of which there were then 43 years unexpired; *John Tasburgh* was therefore advised to bring a bill to hasten the payment of the money, or, in default thereof, to make his estate in the premisses indefeasible: And accordingly a bill was, on the 19th of *April*, 1687, exhibited in the Court of Chancery of *Ireland*, in the name of the said *Charles Tasburgh*, against Sir *John Eustace*; setting forth the nature of the conveyance, and praying that he might be compelled to pay the said principal sum of 200*l.* and the interest thereof, by a certain day, or that the conditional estate of the said *Charles Tasburgh* in the premisses, (in case it should be



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be judged to be a defeasible, or redeemable estate) should be made absolute to him and his heirs; and that in such case, the said Sir *John Eustace* might be foreclosed of all right or equity of redemption of the premises; and might make farther absolute conveyances and assurances to the said *Charles Tasburgh*, according to the tenor and true meaning of the said indentures of lease and release.

Sir *John Eustace* being served with a subpoena to answer this bill, stood out all process of contempt to a sequestration; and on the 16th of *May*, 1688, he thought fit to appear by his fix clerk, and to pray a commission for taking his answer in *England*, which was granted by consent; but it was ordered, that unless the same was returned by the 22d of *June* following, the cause should be set down to be heard, and the bill was to be taken *pro confesso*.

Sir *John* having neglected to answer by the time limited, he, on the 6th of *November* following, had a fortnight's further time given him; but in case he did not answer in that time, the cause was to be set down to be heard, and the bill taken *pro confesso*; and he having again neglected to answer, the counsel for the said *Charles Tasburgh*, in the presence of Sir *John Eustace's* counsel, moved the Court, that a day for hearing might be appointed, and the bill taken *pro confesso*: Whereupon the 11th of *December*, 1688, was appointed; and upon opening the bill on that day, it appearing to the Court, that there was no account in this case to be referred to a Master; it was decreed, that Sir *John Eustace* should pay to the said *Charles Tasburgh*, at one entire payment, the principal sum of 200 *l.* with all interest then due, or thereafter to grow due for the same, on or before the 11th of *December*, 1689, together with his costs, which were afterwards taxed at 26 *l.* otherwise the defendant was to be for ever barred and foreclosed of all equity of redemption of the premises; and was to perfect such conveyances for releasing the equity of redemption, and for the absolute conveying of the premises to the said *Charles Tasburgh*, and his heirs, as should be approved of by a Master.

Sir *John Eustace* afterwards returned to *Ireland*, and lived till the year 1706, when he died without issue; but he never



took any one step to impeach the said proceedings or decree; nor did he ever attempt to seek a redemption of the premises, but acquiesced under the said decree for upwards of 18 years.

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*John Tasburgh*, the appellant *Henry's* father, died in the year 1691, having first made his will, and thereof appointed the appellant *Henry* sole executor and residuary legatee; and he, as eldest son and heir of his father, entered on the premises; and not imagining, that after an acquiescence of 34 years under the decree, any one claiming or deriving under Sir *John Eustace*, could pretend or set up any right or title thereto, and therefore, looking upon himself as the absolute owner thereof; he, by indenture, dated the 24th of *April*, 1722, in consideration of a fine of 300*l.* demised the same to the appellant *George M<sup>c</sup> Nemara*, for the term of 31 years, at the clear yearly rent of 250*l.*

An act of Parliament was made in *Ireland*, in the 8th year of the reign of King *George I.* whereby it was enacted, that in case any mortgagee or mortgagees of any lands, tenements, or hereditaments whatsoever, had been in possession thereof, by the space of 20 years or upwards; and no bill had been brought by the person or persons entitled to the equity of redemption, to redeem the same, or to bring the mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, to an account, and should not before the 29th day of *September*, 1723, commence their suit in equity to redeem such mortgage, and prosecute the same with effect; that in every such case, it should be lawful for every such mortgagee or mortgagees, their heirs, executors, administrators, or assigns, to hold the lands and premises so mortgaged to them, freed and discharged of and from all equity of redemption whatsoever.

For several years after making of the said decree, the premises yielded very little, by reason of the general desolation, occasioned by the troubles which then ensued; but the value of lands in *Ireland* having afterwards risen considerably, a bill was exhibited in the Court of Chancery in *Ireland*, on the 28th of *September*, 1723, (the very day before the said act of Parliament was to have the effect of a law) by *Benjamin Cbet-*



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*wood* in right of *Ann* his wife; *Chetwood Eustace*, a minor, son and heir apparent of the said *Benjamin* by the said *Ann*; *Edward Stratford* and *Penelope* his wife; *Robert Echlin*, son and heir apparent of the said *Penelope*, and *Clotilda Eustace*, spinster, (which said *Ann*, *Penelope* and *Clotilda*, were nieces and coheirs of the said *Sir John Eustace*) against several of the children of the said *Charles Tasburgh*; setting forth, *inter alia*, the said decree of foreclosure, and insisting, that it was obtained by surprise, fraud and imposition, and therefore praying, that the same might be reviewed and reversed, and that they might be let into a redemption of the premises. But they did not think fit to make *Francis Tasburgh*, the eldest son and heir of the said *Charles Tasburgh*, or the appellants, or either of them, parties to this bill; nor was any process made out, or further proceedings had thereon, till the 4th of *September*, 1725, when the bill was amended, by making the appellants and the said *Francis Tasburgh* parties; but they were never served with any process to answer such amended bill, nor were any further proceedings had thereon.

But on the 10th of *October*, 1728, the respondents exhibited their bill in the said Court of Chancery, against the defendants named in the first bill, and also against the appellants and others, stating the substance of the former bills, and that the same abated by the marriage of the said *Clotilda Eustace* with the respondent *Tickle* in 1726, and by the death of the said *Benjamin Chetwood*, and that they were entitled to revive the same, and praying to be let into a redemption of the premises.

The appellant *Henry* being served with a subpoena to answer this last bill, he, on the 17th of *April*, 1729, put in a plea and answer thereto; and as to so much thereof as sought a redemption of the premises, or to compel him to account for the rents, or for any profit made thereof, or to compel him to produce any deeds, evidences or writings relating thereto, he, by way of plea, insisted on the title as before set forth. And he further pleaded the indentures of lease and release of the 30th and 31st of *May*, 1681, executed by *Sir John Eustace*, the declaration of trust executed by *Charles Tasburgh*, the decree of foreclosure, and the proceedings had in that cause; and the great length of time and acquiescence under the said decree.



decree. — And by his answer he denied, that to his knowledge or belief, his late father used any fraud, or took any unfair advantage of Sir *John Eustace*, in obtaining the said decree of foreclosure or otherwise; and said, he was put to very great charges and expences in law, in maintaining the title to several parts of the said premises, particularly the rectories and impropriations. And the other appellant also put in an answer to this bill; and thereby denied, that at or before the time of the execution of the said lease, he had any notice of the respondents title, and insisted, that he was a purchaser, for a valuable consideration, of his said term, without any such notice.

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The appellant *Tasburgh's* plea coming to be argued before the Lord Chancellor of *Ireland*, on the 7th of *July*, 1729, his Lordship was pleased to order, that the same should stand for an answer, with liberty for the respondents to except thereto, and the benefit thereof was reserved to the hearing of the cause.

The respondents replied, and the appellants having rejoined, the respondents, without reviving the former suit, proceeded to an examination of witnesses to matters charged in the former bills, and not properly put in issue in the present suit: And the cause coming on to be heard on the 9th of *February*, 1731, a conditional decree was pronounced against the appellants, without having the said *Francis Tasburgh*, in whom the legal estate of the premises remained, before the Court.

The appellants coming to shew cause against this conditional decree, the cause came on to be argued on the 24th of *November*, 1732, when the Lord Chancellor thought fit to permit the respondents to read as evidence against the appellant *Henry*, certain notes or minutes, pretended to have been taken in Court in the year 1688 or 1689; and the depositions taken on the part of the respondents on the said irregular examination, notwithstanding the objections made to the reading thereof by the appellants counsel: And his Lordship having taken time to consider of the matter, he was pleased to decree, that upon the respondents paying the appellant *Henry*, the principal, interest and costs due to him on the lands and premises in the pleadings mentioned, he should re-convey the same to the respondents



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dents by such deed or deeds of conveyance, as one of the Masters should prepare and settle; and it was referred to the Master to take an account of what was due to the appellant *Henry* for principal, interest and costs, the interest to be at 10*l.* per cent. per ann. for the first five years, ending the 31st of *May*, 1686, at which time the said interest and the principal sum of 200*l.* were to be a liquidated sum; and from thenceforth to carry interest at 10*l.* per cent. to the 25th of *March*, 1704, when interest was reduced by act of Parliament, to 8*l.* per cent. per ann. And the principal and interest due at that period, were to be made a principal sum, and to carry interest at 8*l.* per cent. per ann. from that time, till the 25th of *March*, 1722, when interest was reduced by act of Parliament, to 7*l.* per cent. per ann. And the sum due at that period for principal and interest, was to be made a principal sum, and to carry interest at 7*l.* per cent. per ann. from that time till the expiration of the lease made by King *James I.* to *John King* and *John Bingley*, which expired on the 18th of *May*, 1724. And as to the appellant *M'Nemara*, his Lordship directed the following issue to be tried between the respondents and him, viz. Whether he, at any time and when, had notice that the co-heirs of Sir *John Eustace* had, or claimed any and what right or title to the lands in question, after the lease to *King* and *Bingley* should expire; and his Lordship was pleased to declare, that on return of the verdict, he would make such further order, as to the allowance to be given, and in what manner the account from the expiration of the said lease should be carried on, as should be fit.

T. Lutwyche.  
N. Fazakerley.

From this decree the present appeal was brought; and on behalf of the appellant *Tasburgh* it was insisted, that as this case was circumstanced, there ought to be no redemption upon any terms whatever, it being expressly agreed by the release of the 31st of *May*, 1681, that if the money was not paid within five years, the estate should be irredeemable; it ought, therefore, to be considered as a conditional purchase, and the rather, because there was no covenant on the part of Sir *John Eustace* to pay the money. That as the appellant *Tasburgh*, or those under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage; for, in cases of mortgages, the remedy should be reciprocal, consequently no equity of



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of redemption could arise or spring from the condition contained in the release ; for the supposed pledge was only a reversion expectant on a long term of years, whereof no less than 43 were then to come, during which time, it could yield no manner of fruit or profit ; and, in reality, the 200*l.* was more than a sufficient consideration for the absolute purchase of the reversion, as lands were usually sold in *Ireland* at that time, and for near 20 years after ; so that if the lands had continued to sink in value, as they did for some years, Mr. *Tasburgh* would have had a bad bargain : And it was apprehended, that the subsequent rise in the value of lands in that kingdom, which was totally unforeseen and unexpected at the time of this transaction, could be no reason to turn such a bargain into a mortgage. That the decree of the 11th of *December*, 1688, ought to be binding on Sir *John Eustace*, and upon the respondents, as deriving under him ; and ought not, at this distance of time, to be impeached or altered on an original bill ; and the rather, as Sir *John* had full notice of that decree, and tho' he returned to *Ireland* soon after the reduction of *Limerick*, which happened in *October*, 1691, yet, he never sought for a redemption, or attempted to impeach the decree. That the appellant *Tasburgh's* plea ought to have been allowed, either on the arguing it, or at the hearing of the cause ; for, after an acquiescence of 43 years, without any manner of excuse for the greatest part of the time, the respondents ought not to be admitted to a redemption, so apparently to the appellant's prejudice ; but, on the contrary, their bill ought to have been dismissed with costs. And even supposing this to be the case of a mortgage, clearly and undoubtedly redeemable, yet, considering the length of time that the mortgagor, and those claiming under him, had acquiesced, without demanding such redemption, and regard being had to the other circumstances of this case, there ought to be no redemption decreed. It was therefore hoped, that the decree would be reversed, and the respondents bill dismissed with costs.

On the part of the other appellant *M<sup>r</sup> Nemara*, it was contended, that the money not having been paid at the time mentioned in the conveyance, and there being no remedy on the part of the vendee to compel such payment, but only proviso,

J. Willes.

J Verney.



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giving the vendor an election to re-purchase at the end of five years, which he was at full liberty to do, or not, and could not be compelled to do by the vendee; and the interest purchased being only a dry reversion, from which no annual profit could arise, till the expiration of the term, and consequently could not, during that time, be any fund for the payment of interest, no redemption ought to have been decreed; and especially, after so long an acquiescence under a decree for payment of the money, with interest and costs at a certain day, which was the fullest notice that could be given to the vendor, to make his election, whether he would re-purchase or not, or redeem, if the premises were redeemable: And as that decree was enforced, so far as in its nature it could be, by service of a writ of execution thereof, and never having been complained of by Sir *John Eustace*, but being still in full force, the same ought to be binding upon his representatives, and could not be impeached by an original bill, to which the representative of *Charles Tasburgh*, who was a plaintiff in the former cause, was no party. But even tho' the respondents should be entitled to relief against the appellant *Tasburgh*, yet there was no foundation for granting them any against the appellant *M'Nemara*, who was a purchaser of his lease for a valuable consideration, without any notice of the respondents claim; and who had also laid out very great sums in building upon and improving the premises. Besides, there was no charge in any of the bills, that this appellant had any notice of the claims set up by the respondents; and therefore the issue ought not to have been directed, but the bill ought to have been dismissed as against him, with costs.

D. Ryder.

J. Browne.

To all this it was said on behalf of the respondents, that the nature of the transaction, and the very deeds themselves, evidently shewed, that they were originally intended as a mortgage or security for the 200*l.* lent, and not as a purchase; and it was plain, that *John Tasburgh* understood them so to be, by bringing his bill of foreclosure in 1687. That Courts of Equity have, on all occasions, relieved against restraints imposed upon the equity of redemption, and admitted the mortgagor to redeem, notwithstanding the expiration of the time limited by the parties for that purpose; and have always considered clauses



clauses of this nature, as terms extorted from the necessities of the borrower, and tending to usury and oppression: Nor could any case be more proper for relief, than the present, where the redeemable interest did not commence in possession till 1724, and where the mortgagee was attempting to gain an estate of 900*l.* *per ann.* for so small a consideration as 200*l.* That as to the decree of *December*, 1688, it was conceived not to be binding or conclusive; for Sir *John Eustace* was in *England* during the time of the whole transaction, the decree was obtained without any defence, and in a time of war and general confusion; it was never compleated by a proper jurisdiction and authority, the account thereby directed was never taken, nor the order for foreclosure ever made absolute. And as to the length of time, it was observable, that the lease of 116 years did not expire till the year 1724, which was after the first bill for a redemption was brought; consequently, the appellant *Tasburgh* could not be considered as a mortgagee in possession, till after the expiration of that term, for during the term, he was in possession as a tenant, and not as a mortgagee. Besides, Sir *John Eustace* being in *England*, from the time of making the mortgage till near his death, and in extreme poverty, and his heirs at law having been under coverture or infancy from that time, to the time of filing their bill in 1723, which was before the reversionary estate came into possession; no laches or delay could reasonably be imputed to the respondents. That the manner in which the decree appealed from had allowed interest, by turning it at the end of five years, and also upon every reduction of interest, into principal money, would make the appellant *Tasburgh* ample amends for the non-payment of interest in the mean time; and this was probably foreseen at the time of lending the money, because no profits could be received out of the mortgaged premises, until the expiration of the 116 years term. As to the appellant *M<sup>c</sup>Nemara*, it was said to be proved by the respondents, that the premises were, in 1728, and for several years before, and still were of the yearly value of 900*l.* and that the only consideration for his lease, was a fine of 300*l.* and an annual rent of 250*l.* And it likewise appeared in the cause, that the appellant *M<sup>c</sup>Nemara* had notice of the respondents title, previous to his taking the lease, and that covenants were inserted therein for bearing



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reversed.  
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bearing the loss, in case of an eviction. It was therefore hoped, that the appeal would be dismissed with costs.

BUT after hearing counsel upon this appeal, it was ORDERED and ADJUDGED, that the proceedings, orders and decree therein complained of, should be reversed; and that the respondents bill should be dismissed.

Case 17. *Elizabeth, Dutcheſs of Hamilton,* - Appellant.

*Edward Manby, Esq;* Administrator of  
Lady *Charlotte Orby*, his Wife, who  
was Executrix of Sir *Thomas Orby*, } Respondents.  
Bart. deceased, and Administrator  
*de bonis non* of Sir *Thomas Orby*, }

19th March, 1733.

THE Lady *Charlotte Orby* was one of the sisters and coheirs of *Charles, Earl of Macclesfield*; the appellant was the only daughter and heir of Lady *Elizabeth Gerrard*, another sister and coheir of the said Earl; and *John Elrington, Esq;* was the eldest son and heir of Lady *Ann*, another sister and coheir.

The Lord *Mobun* having got into possession of the real estates of the said Earl, in the counties palatine of *Chester* and *Lancaster*, and dying on the 12th of *November, 1712*, Sir *Thomas* and Lady *Charlotte Orby*, immediately upon his death, and without the direction or privity of the appellant, employed *Richard Vernon*, an attorney at law, to get possession of the said estates: And accordingly, on the 25th of *November, 1712*, *Vernon* got possession of the *Cheshire* estate, and on the 29th of the same month, he got possession likewise of the *Lancashire* estate.

Some time afterwards, Sir *Thomas* and Lady *Charlotte* applied to the appellant, to join with them in granting a power to Mr. *Vernon*, to recover the possession of the said estates, and to receive



receive the attornment of the tenants; pretending, that the appellant's joining with them therein, would have an influence over the tenants, and be of service to them, and they brought a letter of attorney with them ready engrossed for the appellant to execute, dated the 6th of *December*, 1712, telling her it was but a thing of form; and accordingly, at their pressing instance, she executed the same, tho' Mr. *Vernon* was then an entire stranger to her, whereby he was authorised to get the possession, tho' he had really got possession before, and to take the attornment of the tenants.

1733.

Sir *Thomas* and Lady *Charlotte* having got possession, received the rents of the estates, till the Lady *Mobun*, devisee of Lord *Mobun*, recovered possession by ejectments; which suits Mr. *Vernon* defended, by the direction of Sir *Thomas* and Lady *Charlotte Orby*, and they were afterwards ordered, by some decree, to account for the mesne profits, with which the appellant did not intermeddle, nor was she any party to the suit in which such order was made.

Mr. *Vernon*, some time afterwards, delivered to Sir *Thomas* his bill of fees and disbursements and other charges, amounting to 2327*l.* 0*s.* 6½*d.* who settled and allowed the same, without applying to the appellant, or acquainting her therewith.

On the 24th of *May*, 1718, Sir *Thomas* and Lady *Charlotte* brought their bill in Chancery against the appellant and Mr. *Vernon*, and his under-agents, praying that the appellant might pay a moiety of the charges which Sir *Thomas* had paid, and of *Vernon's* bills and other expences concerning the premises; pretending that she had agreed to pay a moiety thereof, and praying against *Vernon* and his under-agents, an account of the rents and profits of the premises received by them.

The appellant, by her answer, denied that she had agreed to pay a moiety of the said charges, or that she was ever asked to pay any part thereof, during the whole time of transacting the affair, or that she paid *Vernon* any money on account, or was privy to the stating of any accounts, or ever owned herself obliged to pay any share thereof.



1733.

Mr. *Vernon* by his answer, said, that he was, upon the very day of the death of Lord *Mobun*, employed by Sir *Thomas* alone; and was, for many years before, his agent in all his other affairs, as well as his intimate friend, and was not employed by the appellant; and that in eleven days after, he got possession of both the estates; and for four years together, he was employed in defending the possession by Sir *Thomas* and Lady *Charlotte* alone, who promised him great rewards, but did not say that he was ever employed by the appellant; but that Sir *Thomas* and Lady *Charlotte*'s counsel advised, that the appellant's and Mr. *Elrington*'s names ought to be put into the proceedings, and they were made parties accordingly.

On the 30th of June, 1719, the cause was heard before his Honour the Master of the Rolls (*ex parte* as against the appellant, and without her being actually privy thereto) who declared, that Mr. *Vernon*'s account, signed by Sir *Thomas*, was not so considered by the parties, that it ought to stand in all events, and that the bill delivered to the appellant was not intended to give a sanction to the said account, but to let the appellant see what a great expence it had been, and to induce her to comply with paying her proportion of such expence; and therefore decreed the account to stand, with liberty for the plaintiff Sir *Thomas* and the appellant to falsify and surcharge the same. — But the *items* therein allowed by Sir *Thomas*, for *Vernon*'s fees and disbursements for business done, were to stand as between Sir *Thomas* and *Vernon*; but as between Sir *Thomas* and the appellant, the Master was to see what of such *items* were reasonable, and to make an allowance thereof accordingly, and decreed the appellant to pay a moiety thereof to Sir *Thomas*. And it was further ordered, that the Master should take a general account between Sir *Thomas* and *Vernon*, from the time of the stated account; and the said *Vernon*'s under-agents were also to account before the Master. And the Master was likewise to take a general account between Sir *Thomas* and the appellant, and all parties were to be examined on interrogatories, and the Master was at liberty to report any matter specially. And it was further ordered, that what upon the said accounts should appear to be due from either party to the other, the party from whom any balance should be found due, should pay the same to the party to whom the same should be certified.



tified to be due: But as to the interest of what upon the said several accounts should appear to be due from any of the parties to the other, the Court reserved the consideration thereof, and also of the costs of the suit, till the Master should have made his report.

1733.

On the 12th of *February*, 1719, this decree was made absolute against the appellant *ex parte*, and without her knowledge. And in *May*, 1720, Sir *Thomas* left his charge against the appellant before the Master, amounting to 1333*l.* 17*s.* 11*d.* but did not proceed thereon: In 1724, he died, having made his will and appointed Lady *Charlotte* executrix, who, on the 15th of *July*, 1724, brought her bill of revivor, but did not proceed any further; and on the 5th of *April*, 1727, she died intestate, having married the respondent, who, on the 9th of *February*, 1731, brought his bill of revivor, and revived the cause.

There were no proceedings before the Master on the decree, from the beginning of *Hilary* term, 1723, till the 23d of *June*, 1732, when the respondent took out a warrant; and, on the 7th of *November* following, he left the said stated account with the Master: Whereupon the appellant caused the pleadings and proceedings to be enquired after, and as soon as she could obtain the same, which was not till the 7th of *December*, 1732, she caused them to be considered; and, conceiving that she was aggrieved by the said decree, she appealed therefrom to the Lord Chancellor *King*, praying that the cause might be heard before his Lordship.

This petition being heard on the 15th of *March*, 1732; his Lordship was pleased to refuse to hear the cause, and dismissed the petition.

The Dutcheſs therefore appealed from this order, insisting, that the decree being erroneous, the cause ought to be reheard; for that by the decree, the account stated by Sir *Thomas Orby* and Mr. *Vernon* was to stand, with liberty for Sir *Thomas* and the appellant to surcharge or falsify the same; whereas it ought not to stand at all against the appellant, she being neither party or privy to the stating of it; nor having had any copy of it till

J. Willes.

T. Lutwyche.



1733.

till after it was stated, and therefore she ought not to be any way affected by what was transacted between Sir *Thomas* and *Vernon* only. That the appellant was no way concerned in Mr. *Vernon's* fees and disbursements, having never promised or agreed to pay the same, or any part of them; and yet she was decreed to pay a moiety of what Sir *Thomas* had paid, or was liable to pay for such fees and disbursements. But if the appellant was liable to pay any part of them, yet being but one of the three coheirs, she ought not to have been decreed to pay a moiety. That the Master was directed to take a general account as between Sir *Thomas Orby* and the appellant, whereas there was no account depending between them, nor was any such general account prayed by the bill. It was therefore hoped, that the said order would be reversed, and that the Lord Chancellor would be directed to hear the cause.

D. Ryder.  
T. Burdus.

On the other side it was said, that though the appellant was now pleased to give all possible delay against carrying the decree into execution, yet she acquiesced under it for above 13 years, and never complained of it from the 30th of *June*, 1719, until the 2d of *February*, 1732. And as a Court of Equity is not bound to grant a rehearing merely for asking it, this long acquiescence afforded the strongest reason for refusing it. That it would be of the most pernicious consequence to the suitors of the Court of Chancery, if causes wherein decrees had been so many years made, such subsequent proceedings had, and so long acquiesced under, were permitted to be reheard, when by the deaths of parties many material deeds and papers might reasonably be supposed to be lost or mislaid; and more especially where, as in the present case, the party had so wilfully neglected to make a defence; for otherwise, no suitor would ever know how to act with safety under such decrees, nor would it be possible, without almost endless trouble and expence, ever to carry them into execution.

ORDER  
reversed,  
Jour. vol. 24.  
p. 383.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed; and that the Lord Chancellor should hear the cause, upon payment of such costs, and upon such terms, as the Court of Chancery should think fit.



The Mayor and Commonalty and Citizens of the City of *London*, - } Appellants. Case 18.

*Thomas Perkins*, and Others, - Respondents.

28th January, 1734.

THE appellants have, time out of mind, been entitled unto, and received from all masters of ships bringing cheese of any persons whatever, *eastward of London-Bridge*, to the port of *London*, to be sold, a duty of 8*d.* per ton for all such cheese, in the name of weighage: And in order to collect such duty, the appellants have always appointed officers called *yeomen of the waterside*, to attend with weights and scales to weigh the cheese, and receive the duty.

But it is usual for the Master of the ship, on his arrival in the port of *London*, to give notice to the officers of the customs, and procure them to transmit an account of the quantity of his cargo of cheese, to the Lord Mayor; who thereupon, directs his warrant in writing to the yeomen of the waterside, to weigh and permit the cargo to be delivered, upon being paid the duty; which the yeomen are ready, and offer to do; yet as the quantity is expressed in such warrant, and that taken from the account given by the Master to the officers of the customs, the duty has been usually paid according to the quantity mentioned in the warrant, and the actual weighing omitted, at the request, and for the conveniency of the Master, unless the quantity is disputed.

This duty, when paid, is applied to the use of the Lord Mayor for the time being, for supporting the dignity of his office.

Besides this duty, the appellants are likewise entitled to, and claim by several charters, the office of keeper of the great beam, or common balance, within the city, for the equal weighing of all merchandise between merchant and merchant, usually bought and sold by weight within the said city; the



1734.

officers for this purpose are appointed by the Mayor, Aldermen and Commons, in common council assembled; and the duties arising upon weighing the said merchandise, are applied to the use of the city.

The respondents, being great importers of cheese, and masters of ships, and having imported great quantities of cheese eastward of *London-Bridge*, and refusing to pay the said duty of 8*d.* per ton; the appellants, in *Trinity* term, 1725, filed their bill in the Court of Exchequer for recovery of the same; setting forth a prescriptive right to the sole weighing of cheese of all persons whatsoever, brought by water eastward of *London-Bridge*; and that time out of mind, the masters of all ships importing the same, ought to pay the said duty of 8*d.* per ton for the cheese, in the name of weighage, the same being allowed to them by their respective owners, and that no ship ought to be unladen before obtaining such warrant from the Lord Mayor as aforesaid; that this was reasonable to be paid as a recompence for the officers attendance, providing weights and scales, and by reason of the advantage the importers received in and about the port of *London*, by the care of the appellants, who are conservators of the said port; that this duty had always been paid by the masters of ships, whether freemen or foreigners, or whether the goods imported were freemen's or foreigner's, until the year 1681, when one *Richard Garret* disputed the same; whereupon, a special action on the case was brought by the appellants against him in the Court of King's Bench, for the said duty; where, on the general issue pleaded, and a full trial had at the King's Bench bar on the merits, a verdict and judgment was given for the plaintiffs; that in the year 1719, the appellants exhibited a bill in the Court of Exchequer, against *William Pallister*, *Rich*, and others, for a discovery and account of the cheese imported, and to compel payment of the said duty; alledging therein the same prescription as in the present bill: In answer to which, the then defendants insisted, that the goods were freemen's goods, and, as such, not liable to the duty; but on hearing that cause, on the 26th of *June*, 1721, it was decreed, unless cause, that the then defendants should account to the plaintiffs for the said duty: And in *Michaelmas* term following, the said decree, on hearing counsel on both sides, was made absolute; and the

then



then defendants accounted for, and paid the duty: And in the same *Michaelmas* term, a like bill was exhibited by the appellants in the said Court of Exchequer, against *Prickett* and others, setting forth the same prescription; when the defendants by their answer insisted, that the goods were freemen's goods, and not liable to pay such duty; and, in *February*, 1722, on full evidence, the like decree was made, and the duty accounted for and paid by the then defendants accordingly. Wherefore the appellants prayed, that the respondents might make a discovery of, and come to an account for the cheese so by them imported, and pay the duty for the same, and that the said duty might be confirmed and established.

The respondents by their answer admitted, that they were masters of ships, and had imported from *Chester* large quantities of cheese into the port of *London*, and had not paid for the same; that the appellants had claimed a right of tronage of all foreigner's goods, but knew not how they were entitled thereto; they also admitted, that the appellants, by charter, were entrusted with the great beam, and with the weighing of foreigner's goods; but insisted, that they were freemen themselves, and that the cheese imported by them was the property of freemen, and therefore exempt from the said duty; and that the said prescriptive right did not extend to freemen masters of ships, importing freemen's goods; that the officers did not attend to weigh such goods, though they admitted they might attend to weigh such foreigner's goods as should be brought to the great beam; but the goods of freemen ought not to be brought to the great beam, nor were liable to pay any duty, but were excepted and excluded out of the several bye-laws and ordinances and acts of common council relating to the payment of such duty.

Issue being joined, and witnesses examined on both sides, the appellants, on the 1st of *November*, 1732, gave the respondents notice, that they intended to move the said Court of Exchequer, that they might have an order for liberty to read the depositions of *John Green*, *Joseph Clements*, *Robert Hughes* and *Francis Bancroft*, taken in the said cause against *Pallister* and others; and also the several depositions of *Robert Weston*, *Roger Dawson*, *Joseph Clements*, *Robert Hughes* and *Francis Bancroft*,



1734.

*Bancroft*, taken in the said cause against *Prickett* and others; at the hearing of this cause on behalf of the appellants, all which witnesses were then dead; which motion the Court, on the 8th of the same month, refused to grant, notwithstanding the like motion had been granted in the said cause of *Prickett* and others, the 1st of *February*, 1722, for reading the deposition of the said *John Green*, then dead, taken in the said cause of *Pallister* and others.

On the 8th of *December*, 1732, this cause came on to be heard; when the appellants, by their counsel, offered to read the several depositions of the witnesses examined in the said causes against *Pallister* and others, and *Prickett* and others; but the Court was pleased to disallow the reading such depositions, because the witnesses were not proved to be dead by depositions taken in the present cause, which the appellants were advised was not necessary. However, to avoid any difficulty in this respect, as far as it was in the power of the appellants, it was offered by their counsel, that they would prove the deaths of the witnesses, whose depositions they intended to read, either by living witnesses, or by affidavits; but the Court, after reading the said verdict, and judgment and decrees, and several depositions in the cause, were pleased to direct an issue to be tried the then next *Easter* term, at the bar of the said Court, whether cheese imported into the port of *London*, eastward of *London-Bridge*, for sale in ships of which the masters were freemen of the city of *London*, on account of freemen of *London*, was liable to pay the duty of 8*d.* per ton, in the name of weighage, as demanded by the bill.

D. Ryder.  
N. Fazaker-  
ley.

The appellants apprehending themselves aggrieved by this decree, and by the Court's refusing their said motion, brought the present appeal; insisting, that it was proved in the cause by many witnesses, that they had time out of mind, enjoyed and received the duty in question, without any distinction whatever between the case of the Master being a freeman, or the cheese belonging to freemen, and other cases; and that there were no witnesses examined for the respondents, who contradicted this fact, or even made the question doubtful. That this very point had come in judgment, upon a trial at law in the most solemn manner, when a verdict was given for the



1734.

the appellants, and had been twice decreed in their favour, upon bills in the Court of Exchequer; and those decrees, and that judgment, allowed to be given in evidence at the hearing of the present cause; so that there seemed to be no reason, why this question should be sent to law to be tried over again, unless it was, to see whether there should be contradictory decrees subsisting at the same time, and of the same Court. That the defence in both the former causes was, that the cheese of freemen ought not to pay the duty, and the prescription was laid in both of them generally, without any distinction; the appellants therefore could not have had a decree, if the right had not been proved to be as general, but had been confined to the case of foreigners. That the duty of the beam insisted on by the respondents, and which the charter and bye-laws proved by them related to, was not the same as the duty in question; but a duty of another kind, claimed by charter, not prescription, applied to other uses, collected by other officers, and in a different manner. That it is not usual for a Court of Equity to direct an issue, where the proof is clear on one side, and the matter proper for the jurisdiction of the Court, and no proof on the other to render the fact doubtful; and especially, when the fact has previously been determined by a jury, and twice adjudged by the same Court of Equity. But if there could have been any doubt of the fact, upon the proofs in this cause, that doubt would have been cleared by reading the depositions in the former causes; and which, as the decrees in those causes were read, ought to have been likewise read. It was therefore hoped, that the decree would be reversed; and that the respondents would be decreed to account with the appellants for the duty on cheese by them imported, and that the said duty would be confirmed and established.

On the other side it was contended, that the proceedings were regular, and the decree just, and agreeable to the rules of equity. As to the proceedings it was said, that the Court of Exchequer were well warranted in refusing to make any order upon the said motion, because it is not in the power of a Court of Equity to make that evidence, which is not evidence of itself; and if the appellants, at the hearing of the cause, had shewn that the depositions had been taken in a

J. Willes.  
J. Strange.



1734.

cause wherein the same point had come in question, and had proved regularly that the witnesses were dead, then the Court would undoubtedly have suffered those depositions to be read. But the appellants failed in both these points: For as to the first, the defendants in both the former causes did not appear to be freemen of the city, and therefore the point in question in this cause was not before the Court in either of those causes; the only point insisted on there being, that the goods belonged to freemen, who were not parties to the suit, but the duty being payable by the Masters, the Court would not enquire whose property the cheese was, and upon that foundation decreed the account. And as to the latter, the appellants had not proved by their depositions, that the witnesses were dead; and tho' they might offer to prove their deaths by affidavits, or *viva voce* at the hearing, yet it is not usual for a Court of Equity to suffer any fact to be proved by affidavit, because in that case, the adverse party has no opportunity of controverting the truth of such fact, by cross examining the witnesses; and according to the rule observed in Courts of Equity, no facts are capable of proof by witnesses *viva voce* at the hearing, except the execution of deeds. — As to the decree it was said, that the duty in question was a demand against the common rights and freedom of every subject of *England*, a burthen upon trade, and a tax upon a useful commodity; and that it could not be maintained, except upon a reasonable custom, supported by uninterrupted usage. 1st, It was not reasonable, with respect to the present case; for tho' it might be reasonable and just to lay an obligation on foreign merchants, who receive the benefit of trading to the port of *London*, to weigh all their goods at a public just balance kept by the city, in order to preserve an exact justice in commerce between foreigners and citizens; yet, by several bye-laws, acts or ordinances of the city, freemen of the city were exempted from such obligation; and as the goods of freemen were under no obligation to be brought to the city beam, or to be weighed there, and as, in fact, the goods in question were never weighed there, but in the scales of the respondents, at their own shops; they had, therefore, no benefit from this pretended custom, and ought not to bear any burthen by means of it; and as the appellants were at no trouble or charge about it, they ought

not



not to receive a reward for doing nothing. And 2dly, It was not proved, that this duty had been paid by such Masters of ships as were freemen, and imported only the goods of freemen; neither had any of the cases, upon which trials had been had, or decrees obtained, come up to the present case; for none of the defendants in those cases were freemen, importing only the goods of freemen; and therefore, as it is not usual for Courts of Equity to establish rights or customs, especially such as are burthensome to the subject, and for which nothing is done, without a trial at law by a jury, which is the birthright of every *English* subject; as the point now in question had never received any judicial determination, either at law or in equity; and as the appellants were better able to support the expence of a trial than the respondents, and must prevail in it, if, on a full examination, the merits and justice of the case would support this custom; it was hoped, that the decree would be affirmed.

1734.

BUT after hearing counsel on this appeal, it was DECLARED, that the Court of Exchequer ought not to have refused to grant an order, for the appellants to have liberty to read the depositions taken in the two former causes, at the hearing of this cause, saving all just exceptions: And it was ORDERED and ADJUDGED, that the decree complained of, should be reversed; and that the respondents should severally account with and pay to the appellants, the said duty of eight pence *per* ton for all such cheese as had been imported by the respondents respectively into the port of *London*, eastward of *London-Bridge*: And it was further ORDERED, that the Court of Exchequer should give proper directions to the Deputy Remembrancer of the said Court, for taking the said account.

DECREE  
reversed,  
Jour. vol. 24.  
p. 448.

*Elizabeth,*



Case 19. *Elizabeth*, Countess Dowager of *Kildare*,  
 and Lady *Catherine Jones*, Daughters  
 and Coheirs of *Richard*, Earl of *Ranelagh*,  
 - - - - - } Appellants.

*Richard Hopson*, Esq; Administrator with  
 the Will annexed of Sir *Charles Hop-*  
*son*, his Father, deceased, - } Respondents.

5th February, 1734.

THE Earl of *Ranelagh* being indebted to Sir *Charles Hopson*, upon a stated account, in 800*l.* by articles of agreement, dated the 10th of *August*, 1705, obliged himself, his heirs, executors and administrators, to pay to the said Sir *Charles Hopson*, his executors, administrators and assigns, the said sum of 800*l.* by quarterly payments, after the rate of 80*l.* a year, until the same should be fully satisfied, the first payment to be made at *Michaelmas* then next; and on that condition, Sir *Charles Hopson* agreed to take his said debt by such quarterly payments.

The Earl, in part performance of these articles, made three payments of 40*l.* each, amounting to 120*l.* the last of which payments was in *February*, 1706; and this was all the money ever paid by the Earl, or any other person towards satisfaction of the said 800*l.*

By indentures of lease and release, dated the 20th and 21st of *December*, 1708, made between the Earl of the one part, and the Duke of *Ormond* and others, trustees therein named, of the other part; the Earl conveyed to the trustees and their heirs, all his *Irish* estate therein mentioned, of 4000*l.* a year and upwards, to the use of the trustees, their executors and assigns, for 200 years, from the death of the Earl, in trust, that out of the rents, issues and profits of the premises, and not by sale or mortgage thereof, they should pay the several debts and incumbrances therein mentioned, and particularly to the said Sir *Charles Hopson*, the yearly sum of 80*l.* pursuant to the said articles.

In



In *April*, 1710, Sir *Charles Hopson* died, having made his will, and appointed *John Churchill*, *Nicholas Goodwin* and *Thomas Woodford*, executors thereof; *Churchill* and *Goodwin* proved the will, *Woodford* refusing to act, and thereby became entitled to the residue of the said 800*l.* But, before they received the same, or any part, viz. in *January*, 1711, the Earl died, leaving *Mary*, Countess Dowager of *Ranelagh*, his widow, and three daughters, his coheirs, namely, the appellants and Lady *Frances*, who afterwards intermarried with the Earl of *Coningsby*; who thereupon took possession of all the said *Irish* estate, and received the rents and profits thereof, which would have been sufficient to discharge all the debts due and charged thereon. But there appearing other charges and demands upon the premises, which were to be satisfied in preference to the said debt of 800*l.* due to Sir *Charles Hopson*, particularly one annuity of 1600*l.* payable to the Countess of *Ranelagh* for life, besides 40*l.* a year for stables, &c. no part of the arrears of the said 80*l.* a year was ever paid to the executors of Sir *Charles*.

1734.

The two acting executors being dead, and Mr. *Woodford* refusing to act, letters of administration, with the will annexed, of Sir *Charles Hopson*, were granted to the respondent, his son, whereby he became entitled to the remainder of the said 800*l.*

The respondent, for several years after the death of Sir *Charles Hopson*, his father, was an infant, and knew nothing of the said debt, or how it was secured, or where, or to whom to apply for a satisfaction of the same; but having at last received full information, and obtained the said articles, the respondent, on the 12th of *February*, 1729, exhibited his bill in the Court of Chancery, against the appellants and others, in order to have a satisfaction of 680*l.* which remained due, and the interest thereof.

To this bill, the appellants and the other coheirs appeared, and put in their answers; the appellants thereby admitting the justice of the debt, and the articles and deed of trust executed by the Earl of *Ranelagh*, for securing the payment of the same. in such manner as aforesaid, and that they were ready to pay the said 680*l.*: But whether they ought to pay interest for the same, they submitted to the judgment of the Court.



1734.

On the 30th of *October*, 1733, the cause was heard before the Lord Chancellor *King*, when his Lordship decreed, that it should be referred to the Master, to compute interest for 80*l.* part of the said 680*l.* from *Christmas* 1706 to *Christmas* 1707, and so for every succeeding year yearly, until the same should be paid, and in like manner to compute interest for each and every other 80*l.* part of the 680*l.* yearly, from the time the same respectively became due, until the same should be paid, and for the last sum of 40*l.* remainder of the said 680*l.* from the time the same became payable, until the same should be paid, and that such interest should be computed at the rate of 5*l.* *per cent. per ann.* And it was further ordered, that the Master should tax the respondent his costs; and the appellants and the defendant Lady *Frances Coningsby* having admitted, that they had been in possession of the trust estate, charged with the payment of the debt claimed by the respondent, and that the rents and profits thereof were sufficient to pay all the debts charged thereon by the deed of trust; it was further ordered and decreed, that the said defendants should pay to the respondent the said sum of 680*l.* together with the interest for the same, and also his costs, to be taxed by the Master.

J. Willes.  
N. Fazaker-  
ley.

From so much of this decree as related to interest and costs, the present appeal was brought; and on behalf of the appellants, it was insisted, that the debt due to the respondent was not in its nature such a demand, as ought in a Court of Equity, to carry interest; especially, as there was no default in the Earl of *Ranelagh*, or his representatives, in paying the same as stipulated by the articles. That as the appellants were entire strangers to the respondent, and to all other the representatives of Sir *Charles Hopson*, they could not pay the money before any demand was made; and as they, upon the very first application, submitted to pay it, it was an extraordinary hardship upon them to be charged both with costs and interest, which augmented the debt to above double the principal sum. That the respondent, by his bill, had only claimed the benefit of the trust term of 200 years, and by the deed creating that term, no provision was made for paying the respondent's demand, other than so far as regarded the principal; and as the term was subject to other large incumbrances, it would in a particular manner affect the other creditors, should the respondent's



dent's demand of interest be established: For, by that means, the other incumbrancers must necessarily be postponed, and perhaps wholly defeated of their just demands, the rents and profits of the estate being but barely sufficient to satisfy the debts charged thereon without interest. If however the respondent should be held entitled to interest, he should resort to the personal estate of the Earl, and for that purpose, ought to have brought his representative before the Court, but which he had not done; and therefore it was hoped, that the decree, with respect to interest and costs, would be reversed.

1734.

In support of the decree, it was contended, that the whole 800*l.* was originally due on a stated account, so long ago as August, 1705, and that the accepting it by instalments, was a favour granted by Sir Charles, which the Earl could not in justice demand; and as those future times of payment were settled by articles, interest ought of course to run upon the delay of payment from those times. That the articles entered into by the Earl of *Ranelagh*, bound his heirs to the due performance of them by payment of 80*l.* a year, till the 800*l.* was paid; and therefore, by virtue of the articles, the Earl's assets, real as well as personal, were liable to answer interest for the nonpayment of every 80*l.* as it became due according to the articles. That the Earl's conveyance of his estate to trustees for 200 years, to commence from his death, was a further security for payment of the 80*l.* a year; and there being sufficient to answer interest as well as principal, it was but reasonable, that it should be answered to the creditor who first made a composition to have the debt paid according to the articles; and if he could not have it so paid, it was but just that the interest should be answered, there being a fund sufficient to do it; and as to the costs, they were a necessary consequence of the right.

D. Ryder.  
J. Strange.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed; with this variation in that part of it directing the computation of interest; viz. that instead of 5*l.* per cent. the interest should be computed at the rate of 4*l.* per cent. only.

DECREE affirmed, with a variation.  
Jour. vol. 24, P. 453.

Elizabeth



Case 20. *Elizabeth Paschall*, Spinster, administra- } Appellant.  
trix of *Lady Bromsfall*, -

*Mark Thurston*, Esq; Executor of *Su-  
sannah Herbert*, who was the Admi-  
nistratrix of *Dr. Herbert*, *Mary Jeay*  
and *Catherine Haselden*, the Heirs at  
Law of *Sir Thomas Bromsfall*, *Brom-  
sfall Throgmorton*, Esq; *Edward Nigh-  
tingale*, Esq; a Mortgagee, *Grace*,  
Countess of *Granville*, *Sir Thomas*  
*Cross*, Bart. *John Lord Carteret*, and } Respondents.  
*Sir Clement Cotterell*, Knt. Trustees  
for the Creditors of *Dr. Herbert*,  
*Edward Prideaux Gwynn*, Esq; Heir  
and Executor of *Francis Gwynn*,  
Esq; the surviving Trustee named  
in the Marriage Articles of *Sir Tho-  
mas* and *Lady Bromsfall*, - - }

27th February, 1734.

3 Wms. 197.  
Viner, vol. 4.  
p. 57. ca. 20.  
2 Eq. ab. 133.  
ca. 5.

**B**Y articles, dated the 17th of *October*, 1704, between  
*Thomas Bromsfall*, Esq; afterwards *Sir Thomas Bromsfall*,  
Knt. of the first part, *Mary Colinge*, widow, of the second  
part, and *Francis Gwynn* and *Richard Powis*, of the third part;  
the said *Thomas Bromsfall*, in consideration of his then intended  
marriage with the said *Mary Colinge*, and her marriage portion,  
covenanted for himself, his heirs, executors and administrators,  
with *Gwynn* and *Powis*, their executors and administrators,  
that in case the marriage took effect, he would, before the end of  
*Easter* term then next, well and sufficiently grant, settle and  
assure, all those his manors, lands, tenements, hereditaments  
and premises, in *Biggleswade* in the county of *Bedford*, to the  
use, intent and purpose, that his intended wife should receive  
an annuity, or rent charge of 500*l.* a year, during her life,  
clear



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clear of all taxes and deductions whatsoever, to be paid by quarterly payments; with a power, in default of payment, for her and her assigns, from time to time, to distrain on the said premises for the said 500*l.* a year; and in default of payment by the space of 60 days; and of a sufficient distress, to enter upon and hold and enjoy the premises, till the said rent-charge, and the arrears thereof, and all costs and damages should be fully paid and satisfied; which was declared to be for her jointure, and in full of dower: And by the same articles he covenanted, that all such other lands as he should afterwards purchase, or become seised of in *Biggleswade* aforesaid, should be charged with the said annuity; and at his own costs and charges, on the request of the trustees, be conveyed accordingly.

The marriage soon after took effect; and, on the first of *February* following, *Sir Thomas Bromsall* died, before any settlement was made pursuant to the said articles; whereupon his real estate, for want of issue male, descended to *Mary* his only surviving daughter, by a former wife, and *Elizabeth Haselden* and *Catherine Haselden*, his only grand-children, as his co-heiresses at law.

The estate at *Biggleswade* being part freehold and part copyhold; and, by reason of a mortgage upon it for 2500*l.* to the respondent *Nightingale's* father and testator, not being sufficient to pay and secure the annuity to *Lady Bromsall*, the relict and administratrix of *Sir Thomas*; she, together with her trustees, in *Easter* term, 1705, preferred a bill in the Court of Chancery, against the coheirs of *Sir Thomas Bromsall* and the mortgagee, to have that estate cleared of incumbrances, and the annuity and arrears made good, or that the estates which descended to the coheirs might be sold, or charged with the payment thereof; and that the *Lady Bromsall* might redeem the mortgage, if she thought fit, and keep the same as a charge upon the estate, in order to protect her annuity; and that the coheirs should be decreed specifically to perform the articles.

In *Trinity* term, 1705, the coheirs exhibited a cross-bill for a discovery of *Sir Thomas's* personal estate; and, on the 14th of *May*, 1707, both causes were heard before the Lord Chancellor *Cowper*; when several special directions were given relat-



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ing to the copyhold estate, and for lands to be set out with it, to make up the value of 4000*l.* for the coheirs, who claimed the same by virtue of marriage-articles made by the said Sir *Thomas*, on his marriage with his former wife; and as to the Lady *Bromfall*, it was referred to a Master, to enquire what was due to her for her annuity, and to tax her costs, to be paid out of the estate; liable to Sir *Thomas's* covenant.

On the 12th of *May*, 1709, the Master having made his report, in respect to the copyhold lands, and other things; and exceptions having been taken thereto, those, and the matters reserved, came on to be heard; and it was then ordered, that Lady *Bromfall*, and her assigns, should hold and enjoy all the rest of Sir *Thomas Bromfall's* estate, except the lands to be set out as aforesaid, for satisfaction of her rent-charge, and the arrears and growing payments thereof; and that she should be at liberty to redeem Mr. *Nightingale's* mortgage, and to hold over till repaid, and until paid the arrears of her rent-charge, with interest from the times the same ought to have been paid, and her costs; but she was not to be let into possession, nor were the tenants to pay to any of the parties, till further order.

On the 5th of *March*, 1709, the Master having made another report, and set out lands to make up 4000*l.* for the coheirs; the cause came on again; when it was ordered, amongst other things, that the Lady *Bromfall* should be at liberty to redeem *Nightingale's* mortgage; and thereupon he was directed to convey and assign the mortgaged premises to her; in which conveyance all proper parties were to join; and she and her assigns were to hold the same till she should be repaid what she should pay to *Nightingale*, and also the arrears of her rent-charge, with interest and costs; and that possession of all the rest of Sir *Thomas Bromfall's* estate, not set out to the coheirs, should be forthwith delivered to Lady *Bromfall*; and that all the tenants should attorn and pay their rents in arrear, and future rents, to her, or to whom she should appoint; and that she and her assigns should hold and enjoy, until fully reimbursed what she should pay towards discharge of the mortgage, with interest, and until she should be paid her annuity and growing payments, and all arrears, with interest from the  
respective



respective times the same ought to have been paid, and her costs, which were to be settled by the Master.

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On the 25th of *July*, 1710, the Master made a further report; to which exceptions being taken and argued, several directions were given, and the report was confirmed: And afterwards, by another order of the 2d of *June*, 1711, it was ordered, that the Master should carry on the accounts from the time of that report, and tax the Lady *Bromfall* her subsequent costs.

On the 18th of *July*, 1711, the Master made a further report, which was confirmed on the 16th of *October* following: But before any further proceedings were had, the Lady *Bromfall* married *John Herbert Clerk*, afterwards *Dr. Herbert*; and they and the trustees, in *Trinity* term, 1712, brought a bill of revivor, and the proceedings were revived accordingly.

On the 10th of *May*, 1714, the Master made a further report; and thereby certified, that there was due at *Lady-day*, 1714, to *Dr. Herbert* and his wife, 4527*l.* 15*s.* 7*d.*; which report was confirmed.

After this, and before any further account was taken, *Dr. Herbert*, without his wife's knowledge or privity, by indenture dated the 9th of *June*, 1729, reciting the marriage-articles, and the said several decrees and proceedings; and that, by the last report, there appeared due to him and his wife 4527*l.* 15*s.* 7*d.*; and that there was further due to them a great sum of money, for the arrears of the annuity, and other sums, by virtue of those decrees and proceedings, which were not then liquidated: To the intent therefore to vest the absolute property and power of disposition of such arrears, in trust for *Dr. Herbert*, his executors, administrators and assigns; and in consideration of 5*s.* only, *Dr. Herbert* assigned, transferred and set over, unto Lord *Carteret* and Sir *Clement Cotterell*, their executors, administrators and assigns, all arrears of the said annuity, and interest thereof, and all other sums of money, debts, dues and demands, by virtue of the said decrees, or any proceedings in the said causes, or otherwise by reason of the annuity then due to him and his wife, or either of them, whether the accounts thereof were stated or not, together



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ther with all such interest which should from thenceforth become due for the same, and all his estate, right, title and interest therein; to hold, receive and enjoy the same, to them, their executors, administrators and assigns, from thenceforth; in trust nevertheless for Dr. *Herbert*, his executors, administrators and assigns, and for no other use whatsoever. And, to the further intent that the property and disposition of the said annuity and interest thereof, which might thereafter become due, during the coverture between him and his wife, might be absolutely vested, in trust for him, his executors, &c. and in consideration of 5*s.* Dr. *Herbert*, by the same deed, assigned and set over the said annuity, and the interest thereof which should from thenceforth grow due, and all his estate and interest therein, in law and equity, to the same trustees for 99 years, if he and his wife should jointly so long live, in trust for the only benefit of Dr. *Herbert*, his executors, administrators and assigns, and for no other use whatsoever.

On the 12th of the same month, Dr. *Herbert*, by a deed-poll, declared his intent and meaning, in vesting the property of the debt already arisen, or which should arise as aforesaid, in the said trustees to be; that upon the death of Dame *Mary* his wife, and not before, they might be enabled, and he did thereby direct them, to pay thereout, in the first place, to Sir *Thomas Cross*, Bart. 500*l.* and 500*l.* to such person as he should appoint by his will, to fulfill the will of his niece *Mary Cullum*, of whose will he was sole executor; to the Right Honourable the Countess of *Granville* 3900*l.* with interest, in full discharge of all her demands upon him: And as to the residue of the said debt then due, and thereby not disposed of, or which thereafter might become due to him in manner aforesaid; he directed the trustees to pay the same, after payment of the sums aforesaid, to such person or persons, and for such uses, as he should by will, deed, or otherwise direct; and if it should happen, that he himself did, by any other way, in the mean time, satisfy and discharge all or any the three before mentioned sums, then it should be lawful for him to direct the payment and disposal of the like sums respectively so satisfied and discharged, to such other uses, as he by his will, deed, or otherwise, should appoint.

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On the 26th of *October*, 1729, Dr. *Herbert* died intestate, without making any other disposition of the premises than as aforesaid.

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On the 2d of *April*, 1730, the Lady *Bromsall* died, before she had taken out letters of administration to the Doctor; and the appellant, being a relation of hers, took administration of her personals; and soon afterwards, *Susanna Herbert*, widow, the Doctor's mother, took out letters of administration to him.

In *Michaelmas* term, 1730, the Lord *Carteret* and Sir *Clement Cotterell* preferred their bill in Chancery against both the administratrixes and against Sir *Thomas Bromsall*'s coheirs and others, to have the accounts carried on and finally taken; and that the coheirs might pay what should appear due thereon; and that the estate might be sold, and the monies arising by such sale be applied towards satisfaction of the mortgage; and afterwards, towards payment of the sums mentioned in the deed of the 12th of *June*, 1729; and that the residue might be paid to such persons, as should appear to be entitled thereto; and that the tenants might be enjoined from paying their rents to the defendants.

To this bill the appellant put in her answer; and thereby submitted to the Court, whether any thing passed by the deed of the 9th of *June*, 1729; and said, that she being cousin-german to Lady *Bromsall*, and one of her nearest kindred, she, with the advice and consent of the rest of the relations in equal degree, took out letters of administration of Lady *Bromsall*'s estate; and thereby, if the annuity of 500*l.* a year, or the arrears thereof, which became due to Lady *Bromsall* out of the estate of Sir *Thomas Bromsall*, did not pass to the trustees by the deeds before mentioned, the same, together with the interest and arrears, or such part of the same as did not pass by the said deed, became due and payable to the appellant, as administratrix; and that in that right she was also entitled to one moiety of the personal estate which Dr. *Herbert* died possessed of, or entitled to.

In *Trinity* term, 1731, the appellant exhibited her cross-bill against the respondents, in order to revive the former pro-



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ceedings in the cause, wherein Lady *Bromfall* was a plaintiff; and to discover the personal estate of Dr. *Herbert*; and in order that the premises might be sold, for discharging the several incumbrances upon them, and particularly the arrears of the said annuity, and interest for the same; and that she might be paid thereout what was due to Lady *Bromfall* at the time of her death.

Both these causes being at issue, were heard before the Lord Chancellor *King* on the 1st of *June*, 1733; when his Lordship was pleased to order and decree, that it should be referred to the Master to take an account of what was due to the defendant *Nightingale*, the mortgagee, for his principal, interest and costs; and that the plaintiffs should pay what was so due, at such time and place as the Master should appoint; and that thereupon the defendant *Nightingale* should re-convey the mortgaged premises to the plaintiffs, or to whom they should appoint; and should deliver the deeds and writings in his custody or power, relating to the premises, upon oath, to the plaintiffs, or whom they should appoint; but in default of such payment, it was ordered, that the plaintiff's bill, as against the defendant *Nightingale*, should stand dismissed with costs, to be taxed. And it was ordered and decreed, that the Master should likewise take an account of what was due for the sum of 4527*l.* 15*s.* 7*d.* reported by a report of the 10th of *May*, 1714, to have been due at *Lady-day*, 1714, for the arrears of the said annuity, with interest for the same from the 17th of *June*, 1714, the time of the confirmation of the said report; and that the Master should likewise take an account of the arrears of the said annuity, that grew due from *Lady-day*, 1714, during the life of Dr. *Herbert*, with interest from the time such arrears ought respectively to have been paid; and that an account should be likewise taken by the Master of what had been received by Dr. *Herbert*, or by his order, or without his wilful default, might have been received out of the estate since *Lady-day*, 1714; and that the same should be deducted out of what was due to him as aforesaid; and for what should remain due after such deduction, it was ordered and decreed, that the plaintiffs should hold and enjoy the said estate, till they should receive satisfaction for the same, together with what they should pay to the defendant *Nightingale*,  
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the mortgagee, as aforesaid, with interest for the same, to be computed by the Master, together with their costs, to be taxed. And as between the plaintiffs and the defendants, it was ordered and decreed, that the plaintiffs should perform the trusts of the said deed of the 12th of *June*, 1729, and that the Master should take an account of what was due to the defendant Sir *Thomas Cross*, for the principal sum of 500*l.* contained in the deed of trust, together with interest and costs, deducting what had been received by him, which was to be paid him by the plaintiffs in the first place out of the money they should receive under the said deed of trust; and as to the second 500*l.* mentioned in the deed of trust, it did not appear, that any appointment was made of it by Dr. *Herbert*, and therefore the same was not to be paid. And in the next place it was ordered and decreed, that an account should be taken of what was due to the defendant the Countess of *Granville*, for the sum of 3900*l.* mentioned in the said deed of trust, together with interest and costs; and that the plaintiffs should pay the same out of what they should receive in the next place; and as to the surplus of what should be received by the plaintiffs, the same was to be considered as part of the personal estate of Dr. *Herbert*, and was to be paid to the defendant Mrs. *Herbert*, his administratrix, to be applied by her in a course of administration. And it was further ordered, that the Master should appoint a receiver to receive the rents and profits of the estate, and allow him a salary for his care and pains therein: But such receiver was first to give security to be allowed by the Master, to be answerable for what he should so receive, as the Court should direct. And it was further ordered, that the receiver should apply the rents, according to the directions aforesaid. And on the cross-bill it was ordered and decreed, that the Master should enquire how much of the said annuity became due between the death of Dr. *Herbert* and the death of Lady *Bromfall*; and as to those arrears, the same were to be accounted for and paid to the administratrix of Lady *Bromfall*, as part of her personal estate. And it was ordered and decreed, that an account should be taken against Mrs. *Herbert*, the administratrix of Dr. *Herbert*, of his personal estate come to her hands, and of his debts and funeral expences; and that the surplus of the clear personal estate of Dr. *Herbert* should be divided into moieties,

and



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and that one moiety thereof should be paid to the plaintiff *Paschall*, the administratrix of Lady *Bromfall*, to be applied by her in a course of administration. And all the parties in both causes were to have their costs out of the estate, to be taxed by the Master.

J. Willes.  
N. Fazaker-  
ly.

From this decree, the appellant appealed; insisting, that the arrears of the annuity, being a *chose in action* at the time of Dr. *Herbert's* assignment, did not thereby pass; but that the same ought to survive to Lady *Bromfall*, there being no settlement made by Dr. *Herbert* upon his marriage with her: If, however, this should be held otherwise in favour of creditors, yet there was no colour to extend it any farther. That the estate ought to have been decreed to be sold; for otherwise, considering the prior incumbrances, and the scantiness of the security, the arrears of the annuity would not be satisfied in any reasonable time, if ever; and there was the greater reason for such a decree, because a sale was prayed by both bills, and would be for the manifest advantage of all parties concerned.

J. Verney.  
E. Green.

On behalf of the respondent *Thurston* it was contended, that by the decree of the 5th of *March*, 1709, possession of the estate was directed to be delivered, and the tenants were to attorn and pay their rents to Lady *Bromfall*; and she was to hold and enjoy the same, till reimbursed her annuity, growing payments and arrears, with interest and costs; that she having possession accordingly, upon her marriage with Dr. *Herbert*, that decree was revived, and he afterwards had possession of the estate under it; and that this being all the recovery which the nature of the case would admit of, the annuity and all arrears thereof, together with the benefit of the decree, became actually vested in Dr. *Herbert*, and he had therefore good right and power to assign and dispose thereof. That this interest and possession of Dr. *Herbert*, in right of his wife, was conceived to be equal to possession under an *elegit* at law; consequently, he had the same power in equity to dispose of that interest, as an husband in possession upon an *elegit*, in right of his wife, would have at law; and in this case, equity should follow the rules of law. Besides, the estate being decreed to the wife, to hold till she should be reimbursed, was in the nature of a term for years, which,



which, without dispute, the husband might dispose of. That this ought not to be considered as a *chose in action*, because it was recovered, and in the possession of the husband under the decree, and thereby became *res judicata*, and as such vested in him. That even *choses in action* are assignable in equity, and that this assignment ought the rather to be supported, because it was made as a provision for the payment of particular debts. By parity of reason, therefore, the surplus ought to go to the respondent *Thurston*, as the representative of Dr. *Herbert*, the better to enable him to pay his other debts, which were chiefly contracted in supporting Lady *Bromfall*, according to her quality and fortune, and would probably never have been contracted, had he received these arrears in his life-time.

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For the respondent Sir *Thomas Cross* it was said, that he was a just and honest creditor of Dr. *Herbert* and his Lady for 500*l.* actually by him advanced, and for the payment whereof, they gave their bond; that this debt was further secured by Dr. *Herbert's* deed of assignment of all the arrears of the rent-charge of 500*l. per ann.* in trust for himself, his executors, administrators and assigns, in order to alter the property thereof; and afterwards, by the deed-poll of the 12th of *June*, 1729, whereby the said assignment was declared to be in trust, in the first place, for securing this respondent's said debt. That the Doctor had a plain power over the arrears then due to him in right of his wife; and as he could release the same without any consideration, so in equity he could assign them; especially when such assignment was for a valuable consideration, and to secure a just debt.

W. Peere  
Williams.

For the respondents, Lady *Granville*, Lord *Carteret* and Sir *Clement Cotterell*, it was argued, that by the report of the 10th of *May*, 1714, made after Dr. *Herbert's* marriage with Lady *Bromfall*, 4527*l.* 15*s.* 7*d.* was reported due to the Doctor and his wife for the arrears of the annuity; and by the rules of law, where the husband and wife acquire a joint right or interest in a personalty, the husband alone may release, or otherwise dispose of the same as he pleases. That by the known rules of equity, *choses in action* are assignable upon valuable consideration, and, in the present case, the assignment

D. Ryder.  
J. Strange.  
J. Floyer.



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by Dr. *Herbert*, appeared to be made upon just and good considerations, for the satisfaction of his creditors; and as it must naturally happen, that many of the Doctor's debts were contracted for the support and maintenance of his Lady, as well as himself, it would be extremely hard, that what was her fortune, and, for any thing that appeared to the contrary, her whole fortune, should, by any nicety of law, be adjudged to go over to her own relations, while her husband's just debts remained unpaid.

J. French.

On behalf of the respondent *Throckmorton* it was said, that he was made a party to both bills, because he was entitled to a moiety of Sir *Thomas Bromfall's* estate, under a conveyance from his mother, who was one of Sir *Thomas's* daughters and coheiresses; but that the subject-matter of the suit, in no respect concerned the heirs or representatives of Sir *Thomas Bromfall*, being a question only between the representatives of Dr. *Herbert* and Lady *Bromfall*; and that therefore the estate of Sir *Thomas* ought not to be charged with the costs of the suit, his heirs being no way concerned or interested in the event of it.

DECREE  
reversed  
in part.  
Jour. vol. 24.  
P. 471.

AFTER hearing counsel on this appeal, and all parties, except the respondent *Bromfall Throckmorton*, consenting, by their counsel, that the estate in question might be sold; it was ORDERED and ADJUDGED, that the decree, so far as the same directed the respondents Lord *Carteret* and Sir *Clement Cotterell*, to redeem the respondent *Nightingale's* mortgage, and in default thereof, that their bill should be dismissed with costs, should be reversed: And it was further ORDERED, that the said estate should be sold before the Master, for the best price that could be got for the same, in which sale all proper parties were to join; and that out of the money arising by sale of the said estate, what should be found due to the respondent *Nightingale*, should be paid in the first place; and that the residue of the money arising by such sale, and the rents and profits in the mean time, should be applied according to the directions of the decree; and if there should be any surplus, one moiety thereof should be paid to the respondent *Bromfall Throckmorton*, and the other moiety to the respondent *Catherine Haseldine*: And it was further ORDERED and ADJUDGED, that the decree,

with



with these variations, should be affirmed; and that the Court of Chancery should give proper directions for carrying the same into execution, and that the respondent *Nightingale* should have 20*l.* paid him for his costs, and also the money reported due to him.

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*William Selwin,* - - - Appellant. Case 21.

*John Brown, Esq;* - - - Respondent.

25th March, 1735.

**J**OHN *Brown*, being seised in fee of a real estate, and possessed of a leasehold house in *Bow-street, Covent-garden*, and of other personal estate, made his will, dated the 23d of *June*, 1732, and thereby gave annuities to some persons, and pecuniary legacies to others, and particularly a legacy of 500*l.* to the respondent; and then the testator devised his manor of *Hubbard's-Hall*, and other lands in *Essex*, to the respondent, with remainder to his first and other sons in tail male; and on failure of such issue, to the appellant and his heirs. And the testator gave his said leasehold house in *Bow-street* to the appellant, for the remainder of the term to come therein, and gave all his plate to the respondent; and then the will goes on in the words following: "And as for the rest, residue and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways entitled to, and which I have not herein and hereby before devised, given, bequeathed or disposed of, I give, devise and bequeath the same, and every part thereof, and all my right, title, claim and interest therein and thereto, unto such my executor or executors herein after named, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators and assigns, as tenants in common, and not as joint tenants; and I do hereby constitute and appoint the herein before named Lieutenant Colonel *John Brown* (meaning the respondent) and *William Sel-*

Forrester 243.  
Viner, vol. 8.  
p. 198. ca. 39.  
2 Eq. ab. 464.  
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“ *win* (meaning the appellant) to be executors of this my last  
 “ will and testament, upon condition, that before their inter-  
 “ meddling as executors, either by proving this my last will  
 “ and testament, or disposing of any part of my estate or  
 “ effects, of the value of 100*l.* or more, (except what may  
 “ relate to, or be disposed of, in or about my funeral, or the  
 “ provision for my family, for a convenient time after my  
 “ decease) they shall give sufficient reasonable security, to  
 “ be approved by the Honourable Colonel *Edward Eaton*,  
 “ for the true payment of the several money legacies herein  
 “ and hereby before given and bequeathed, according to this  
 “ my will; and in case they or either of them shall refuse  
 “ or neglect so to do, for the space of thirty days next after  
 “ my decease, or shall, in the mean time, before such security  
 “ given as aforesaid, intermeddle as my executors or executor,  
 “ any further than as aforesaid, then and in such case, I do  
 “ hereby declare, that such one or both of them so refusing or  
 “ neglecting, shall, from such intermeddling, neglect or refusal,  
 “ lose all benefit of executorship hereby given or intended to  
 “ them, or such of them so intermeddling, neglecting or refus-  
 “ ing; and that such his or their executorship or executorships  
 “ shall thenceforward cease and be void. But in case only one  
 “ of my said executors shall intermeddle, neglect or refuse as afore-  
 “ said, and that the other shall comply as aforesaid, then my  
 “ will and meaning is, and I do hereby direct and appoint,  
 “ that the executorship of him who shall so intermeddle,  
 “ neglect or refuse, and all the benefit and advantage thereby  
 “ given or intended to him shall go over, remain and be to the  
 “ other. And my will and meaning further is, that if one of  
 “ my said executors shall die during my life, and if the surviving  
 “ executor shall give such security as aforesaid, then and in such  
 “ case, such survivor shall be my sole and only executor, and  
 “ shall have and take to his sole use, benefit and advantage,  
 “ and of his heirs, executors, administrators and assigns, all  
 “ such residue and remainder of my estate, and all right, title,  
 “ interest and claim therein and thereto, which I have herein  
 “ before devised to him and my said other executor, as afore-  
 “ said. And my will is, and I do hereby give and bequeath  
 “ to my said executors, or such of them as shall duly qualify  
 “ themselves or himself in manner aforesaid, all such residue  
 and



“ and remainder of my estate whatsoever, as shall be left after  
 “ payment of my said debts and legacies ; and that they or he  
 “ so qualifying themselves, shall have and take the same to and  
 “ for their or his own use or uses, notwithstanding any par-  
 “ ticular legacy or legacies herein before given or devised to  
 “ them, or either of them.”

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On the 19th of *November*, 1732, the testator died without revoking or altering his said will ; and the appellant and respondent, having both duly qualified themselves according to the testator's directions, proved the will, and took upon them the executorship, and paid the testator's debts, funeral charges, and money legacies, and divided equally between them great part of the residue of his personal estate.

But the appellant being indebted to the testator in the principal sum of 3000*l.* the appellant, for securing the payment thereof, with interest, became bound to the testator in a bond, bearing date the 20th of *June*, 1732, in the penalty of 6000*l.* with condition for payment of 3000*l.* and the interest thereof, on the 25th of *December* then next ensuing ; which 3000*l.* and the interest remained due and unpaid at the testator's decease ; and the appellant refusing to account for the money due on this bond, as part of the testator's residuary estate ; but insisting to retain the whole thereof to himself, and refusing to pay or allow to the respondent, the half of the money due on this bond ; the respondent, on the 19th of *March*, 1732, exhibited his bill in the Court of Chancery against the appellant, for an account of the residuary part of the testator's estate, and that the respondent might have his share thereof ; and particularly, that he might be paid half the money due for principal and interest on the said bond.

On the 4th of *July* following, the appellant exhibited his cross-bill against the respondent, praying, that the said bond which then was in the respondent's custody, might be delivered up to the appellant : And by this bill, and also by his answer to the original bill, the appellant alledged, that the testator had several times before the making his will, declared to Mr. *Charles Viner*, who drew it, that he designed to give the appellant, for his own use and benefit, the whole money due



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on that bond; and that it was the testator's intention, by making the appellant one of his executors, to discharge the said bond, that the appellant might have the whole benefit thereof to himself. — And in these causes, the appellant examined the said *Charles Viner* as a witness; who clearly proved such intention of the testator, and what discourses had passed between them relating thereto, before the testator's making his will. — He also proved, that this 3000*l.* was originally secured by a joint bond from the appellant and his partner; and that to prevent the partner from taking any advantage of the benefit intended for the appellant, the testator, about three days before he made his will, delivered up the joint bond to the appellant, and took his single bond for the whole sum.

On the 6th of *December*, 1733, both causes were heard before the Master of the Rolls; who was pleased to allow the deposition of the said *Charles Viner* to be read, though objected to by the respondent; and decreed, that the respondent's bill in the original cause, should be dismissed; and upon the appellant's cross-bill, decreed, that the said bond should be delivered up to the appellant to be cancelled.

From this decree the respondent appealed, and these causes were heard before the Lord Chancellor *Talbot*, on the 15th and 16th of *October*, 1734, who was pleased to declare, that the money due on the 3000*l.* bond, entered into by the appellant to the testator, ought to be considered as part of the residue of the testator's estate, which by his will was devised equally between the respondent and the appellant, his executors; and that the respondent was entitled to a moiety of the money due on the said bond: And his Lordship therefore decreed, that it should be referred to the Master to take an account of what was due for principal and interest on the said bond, and what the moiety thereof amounted to; and that the appellant should pay to the respondent what the Master should certify to be due for a moiety of the said principal money and interest; and that thereupon the respondent should deliver up the said bond to the appellant.

J. Willes.

D. Ryder.

And from this decree the appellant appealed, insisting, that the parol evidence was very proper to be read, and was a sufficient



sufficient ground to bar the equity of the respondent's bill: For that by the rule of law, if an obligee makes the obligor one of his executors, this act of the testator extinguishes the debt; for the debt consisting only of a right to recover it by way of action, which one executor cannot maintain against the other; the testator by making the debtor one of his executors, does thereby discharge the action, and consequently discharges the debt. That it was proved beyond contradiction, that the testator not only knew the rule of law in this respect, but intended it should operate for the appellant's benefit; and therefore a Court of Equity ought to permit it to take place in support of the testator's intention, which is principally to be regarded in the construction of wills; and where the testator's intent to discharge the debt is clear and evident, it is not material whether he does it by express words, or by an act in law amounting to the same thing. That the respondent's case was very different from the case of a creditor, in respect of whom this debt would be considered as assets in the hands of the executor; because a testator cannot by his will extinguish a debt to the prejudice of creditors: But, with respect to a residuary legatee, the testator has an absolute power over his estate, and may extinguish a debt by act in law, as well as by express words. That as the respondent's equity arose only from a presumption that the testator did not intend by act in law, to extinguish the debt, it was apprehended, that the executor might encounter and rebutt this equity, by giving parol evidence, that the testator's intent was agreeable to the law, and unextinguishment in equity as well as law, of the debt in favour of the executor; and there are many instances in the Courts of Equity, where parol evidence has been allowed to be read, in order to support the construction of the law, and rebutt an equity that might otherwise arise against the legal operation of a deed or will.

But it may be objected, that by the will the residue of the real and personal estate not therein before given, bequeathed, or disposed of, is given to such of the testator's executors therein after named, as should prove his will; and from hence it is inferred, that this debt not being therein before disposed of, passed by this clause of the will as part of the *residuum* thereby bequeathed; and that the subsequent clause which constitutes the



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the executors, comes too late to affect any part of the *residuum*, in regard it is compleately disposed by the antecedent clause. — To this it is answered, that the testator having given particular legacies to each of his executors, there was a necessity for a special bequest of the *residuum*, to prevent a resulting trust for the next of kin; but the testator even in this part of the will considered them as executors, and bequeathed the residue to them by that name and description; and therefore as they must first be executors before they could take the residue, the debt must, in the first place, be thereby extinguished, and consequently disposed of, before the residuary bequest could take effect; and as the whole will took place at the same time, it was immaterial whether the executors were appointed in a clause previous or subsequent to the residuary bequest. Besides, the word *residue* must mean the residue of the personal estate existing at the time when the will should take effect, at which time the debt, by operation of law, became extinct, and ceased to be any part of the residue, and consequently did not pass. And as this was the natural meaning and import of the word, so it was plain from the evidence in the cause, that the testator understood the word *residue* in this sense; because he intended, that by making the appellant executor, the debt should be extinguished and cease to be part of his personal estate; so that this construction was apprehended to be consistent with the words of the will, and agreeable to the intent of the testator.

It may however be objected, that if the testator had intended the debt to be discharged, he would have so directed in clear and explicit terms. — But to this it is answered, that Mr. *Viner* proved the testator's intent not only to discharge the debt, but to discharge it by the particular method of making the appellant a co-executor of the will; and his testimony stood confirmed by the circumstance of exchanging the joint bond of the partners for the appellant's single bond, which could not be accounted for, unless it was done to serve this particular purpose; and the testator's omission to discharge the debt by express words, was occasioned merely by *Viner's* assurances, that the making of the appellant a co-executor was the proper and effectual method to extinguish the debt in his favour. As therefore the testator, relying upon this advice, had neglected to  
discharge



discharge the debt by express words, and depended on the rule of law as equivalent to an express discharge; it was apprehended, that a Court of Equity ought not to defeat the testator's design, by controuling the operation of law which was so manifestly agreeable to his intent, and implied as much as words could express; and consequently that the last decree ought to be reversed, and the first affirmed.

On the other side it was contended, that the money secured by the bond in question, was indisputably part of the testator's personal estate at the time of making his will, and remained so at his death; and that the respondent's title to a moiety of it, did not arise from any construction or rule of equity, nor was it given him by implication only, or by doubtful or uncertain expressions in the will, but by a plain and express devise of a moiety of every part of his personal estate not before devised. That no construction could be put upon the words of the will in favour of the appellant, but his case rested wholly upon an endeavour to destroy the force of the written will, and overturn the plain words of it by parol evidence only; there was however no precedent to support such an attempt, this not being the case of evidence offered to obviate or take off an implication, which might or might not take place, and yet the words of the will have their force and operation; nor to answer any rule or construction of equity arising upon, or consistent with the words of the will; but to controul and take away a plain devise and express gift to the respondent. That the giving way to parol proof in a case thus circumstanced, would shake the rule of evidence, and tend to introduce those inconveniences which are guarded against by the statutes of frauds and perjuries, whereby it is enacted, "that no will in writing shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only;" and therefore the respondent hoped, there was no reason to make a precedent in this case, where the attempt to alter a plain bequest in the will was supported by one witness only, and whose deposition, if permitted to be read, contained facts and circumstances highly improbable.

J. Verney.

N. Fazakerly.

W. Murray.



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DECREE  
affirmed.  
Jour. vol. 24.  
p. 500.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.\*

Case 22. *John Anstis*, Esq; - - - Appellant.  
*John Gandy*, and *Frances* his Wife, - Respondents.

31st March, 1735.

Grounds and  
Rudiments of  
Law and E-  
quity, p. 153.  
ca. 11.  
2 Eq. ab.  
196. note to  
ca. 17.

*MARY* the daughter of *John Anstis*, the appellant's father, and sister of the half-blood to the appellant; on the 23d of *September*, 1693, intermarried with *William Hooper*, who, on the 3d of *December*, 1700, died intestate, leaving issue by her the respondent *Frances*, and *Mary*, afterwards wife of *John Swinnerton Dyer*, and his wife enseint with a posthumous son; who was born on the 16th of *February*, 1770, and named *William*.

*Mary*, the mother, took out administration to her husband, and possessed his real and personal estate; and upon her husband's death, removed to the appellant's father's house in *Cornwall*, who maintained her and her children till the time of her death.

On the 3d of *February*, 1707, the mother died, having made her will, and thereby gave the respondent *Frances* and her sister all her goods and chattels, and made them executrixes; and during their minority, appointed her brother-in-law the Reve-

\* The memorandum of this judgment written on the back of the case, is in these words: "The depositions of *Charles Viner*, Esq; as to the verbal directions given him by the testator for making the will, and of what he declared was his intention on that occasion in favour of the appellant, being refused by the House of Lords to be read; and the deposition to give an account of the affair of the delivering up the bond entered into by the appellant to Mr. *Brown*, the testator, in order to raise a construction of the intent of the said *Brown*, independent of the words of his will, being also refused by the Lords to be read; the decree of the Lord Chancellor reversing a decree of the Master of the Rolls, was affirmed."



rend Mr. *John Penneck*, *William Bond*, Esq; and the said *John Anstis* her father, their guardians and trustees.

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Mr. *Penneck* and Mr. *Bond*, declining to act in the trust, the appellant's father solely acted therein, and managed the personal estate given to the respondent *Frances* and her sister, and also the estates of his grand-son *William*, and maintained him from his birth till his death, in *November*, 1712; and also the respondent *Frances* and her sister, until *June*, 1713; when they were sent to the appellant in *London* for their better education.

Upon the death of *William* the son, his estate came to the respondent *Frances* and her sister; and the appellant's father managed the same, as well as the estate which before belonged to the respondent and her sister, until his own death; which happened in *January*, 1713, having first made his will, whereby he gave to the respondent *Frances* and her sister 100*l.* a-piece, and remitted whatsoever was due to him for their maintenance respectively, and what he had laid out about their brother's funeral; and made the appellant his executor.

The appellant, after the death of his father, at the request of the respondent and her sister, took upon himself the care of them, and the management of their estates, and maintained them and their servant from *June*, 1713, to *March*, 1717; during which time he was at considerable expence in their maintenance, cloaths, schooling and sickness; an account whereof was entered and kept in a book provided for that purpose.

The appellant finding that the respondent and her sister would not be prevailed upon to live within the income of their estates, proposed to Mr. *Penneck*, their uncle, that they might be sent to live with him in *Cornwall* to prevent such great expences, and to break off, if possible, the contracts of marriage which they had entered into clandestinely, and to their disparagement; to which proposal Mr. *Penneck* agreed. But before they left the appellant's house, the respondent being then 20, and her sister upwards of 21 years of age, after examination of all the *items* of the said account, in the presence of two witnesses, they freely and voluntarily signed the same, amount-

ing



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ing to 846*l.* 15*s.* 10*d.* with the following subscription thereto.  
 “ We do acknowledge to have received from our uncle *John*  
 “ *Anstis*, Esq; Garter King of Arms, the several sums con-  
 “ tained in this account, from the 20th of *June*, 1713.  
 “ Witness our hands the 1st day of *March*, 1717.”

The respondent *Frances* stopping at Mr. *Penneck*'s house at *Exeter*, in her way to *Cornwall*, made a contract of marriage with the respondent *John Gandy*, and went to his father's house; and they intermarried on the 5th of *September*, 1718, when she was under age, and against the consent of her relations. But before this marriage, the respondent *John Gandy* and his father were acquainted with the debt due to the appellant; and promised, that the marriage should not be had till these matters were settled.

Upon this marriage, the respondent and also Mr. *Dyer* and his wife, entered upon all their estates, and possessed themselves of the stock thereon, which had been bought by the appellant, and received the rents then in arrear, which had accrued due during the time she was maintained by the appellant.

In *Easter* term, 1719, the respondents, together with *Dyer* and his wife, brought their bill in Chancery against the appellant for an account, and to be paid the rents and profits of the estate, since the appellant's father took possession thereof, according to the value of such estate; and for the personal estate of the respondent's father and mother, and the real and personal estates of their brother, received as well by the appellant's father as by the appellant: To which bill the appellant put in his answer, annexing thereto a full and particular account of all the receipts and payments during the management of the estate by his father and himself.

In *Michaelmas* term following, the appellant brought his cross-bill against the respondents and the said *Dyer* and his wife, for an allowance for the board and maintenance of the respondent *Frances* and her sister, and their maid servant, while they lived with the appellant, and for the maintenance of their mother and brother while they were maintained by the appellant's father; and that the respondent and her sister might  
 come



come to an account with the appellant, and pay him what should appear due thereon, and interest for the balance of the account signed by them as aforesaid.

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Witnesses being examined, it was fully proved on the part of the appellant, that he, from time to time, admonished the respondent *Frances* and her sister to live according to their incomes, and therefore caused an account thereof to be delivered them in writing; that the appellant and his wife constantly checked them for running into such great expences; that the respondent *Frances* and her sister, whilst under the appellant's care, entred secretly into contracts of marriage, which he prevented from taking effect: That all the things bought for the respondent and her sister, were at their particular request; and that an account thereof was entred in a book kept for that purpose; that the appellant requested them, on their first coming to his house, to keep a counter book, which they accordingly did; that they deliberately examined every item of the account, and freely signed the same. And that the appellant, during his care of the respondents, continued a correspondence with Mr. *Penneck*, and had his approbation of the appellant's management in every respect.

On the 1st of *March*, 1724, both causes were heard before the Master of the Rolls; when it was, among other things, decreed, that the appellant should account before the Master for what of the personal estate, and the rents and profits of the real estate of *William Hooper*, the respondent's father, came to the hands of their mother *Mary Hooper*; and for what of their father and mother's estate came to the hands of the appellant's father, or of any person for his use; and for what thereof came to the appellant's hands, or to the hands of any person for his use; and the Master was to make the appellant an allowance for the board and maintenance of the respondent's mother and brother, during the time they respectively lived with the appellant's father, and for the maintenance of the respondent and her sister, during the time they lived with the appellant, since the death of his father, not exceeding the interest of their fortunes; but the appellant was not to have any allowance for the respondent's maintenance during the life of the appellant's father; and the respondent's sister, after she



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came of age, having signed an account of what money, cloaths and necessaries she received from the appellant (being the account before mentioned to have been signed by the respondent and her sister) the same was to stand and be allowed as against her, with liberty to falsify or surcharge the same; and the appellant was to be answerable for what of the respondent's father's estate came to the hands of her mother, no farther than her assets would amount to pay; and costs were reserved till after the Master's report.

On the 9th of *December*, 1731, the Master made his report, and thereby certified, that, old Mr. *Anstis*, from the death of Mr. *Hooper* the father, had the management of the personal estate, and received the rents and profits of the real estate of the respondent's mother and brother, and maintained them to the time of their respective deaths: That the account, touching the same, being very perplexed and intricate, he had forbore entering into the particulars, but had, to the time of the mother's death, set and allowed the rents and profits of their estates against the maintenance of her and her son: That the appellant, by his answer, had admitted to have been received by his father and himself, or their agents, from the death of the mother, to the time of the respondent's marriage, after deducting all payments and outgoings, 890*l.* 13*s.* 5*d.* one half whereof being 445*l.* 6*s.* 9*d.* was the share of the respondent *Frances*; besides which, he had charged the appellant with two legacies of 20*l.* and 100*l.* given the respondent by her aunt's and her grandfather's wills, amounting with interest to 182*l.* so that the whole charge against the appellant, as between him and the respondent, amounted to 627*l.* 6*s.* 9*d.* out of which the Master had allowed 225*l.* for the maintenance of the respondent *Frances*, from the death of her grandfather on the 22d of *January*, 1713, to the 2d of *March*, 1717, after the rate of 55*l.* *per ann.* which, as he computed, was the income of her fortune; as also 47*l.* 10*s.* being one half of the maintenance of the respondent's brother, amounting together to 272*l.* 10*s.* which being deducted from the 627*l.* 6*s.* 9*d.* left a balance coming to the respondent of 354*l.* 16*s.* 9*d.*

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The appellant took several exceptions to this report, which came on to be argued before the Lord Chancellor *King* on the 6th of *July*, 1733; and the first exception being, for that the Master had not made the appellant any allowance for the board and maintenance of the respondent's mother, during the time she lived with the appellant's father, nor for the board and maintenance of *William Hooper*, the respondent's brother, whilst he was maintained by the appellant's father, during the lifetime of his said mother, pursuant to the decree; it was ordered, that it should be referred back to the Master on that exception, with this direction, that the maintenance was discharged up to the 28th of *May*, 1706, and the Master was to make the appellant an allowance for maintenance to the death of the respondent *Frances's* mother; and the appellant was to account for the profits accrued due since the said 28th of *May*, 1706.

The fourth exception was, for that the Master had not allowed the appellant several sums paid and disbursed by his father for the respondent *Frances* and her sister, whilst they were placed by him at a boarding-school at *Exeter*, after their mother's death, amounting to 121*l.* 15*s.* 8*d.* — The fifth exception was, for that the Master had not allowed the appellant 32*l.* for two years wages, and board of a tutoress kept by the appellant's father in his house, to teach and instruct the respondent *Frances* and her sister. — The seventh exception was, for that the appellant was not allowed for the half or share belonging to the respondent *Frances*, of the cattle and other goods on her estate, at the time of the respondent's entering thereon, and which they and Mr. *Dyer* and his wife took into their possession, of the value of 147*l.* 12*s.* — being part of the produce of that estate, during the time the respondent *Frances* lived with the appellant, after the death of his father; for which moiety of cattle and goods, the respondent *John Gandy*, by his examination to interrogatories before the Master, submitted to account. — The eighth exception was, for that the appellant was not allowed 58*l.* 18*s.* 6*d.* due and in arrear for rent of the respondent *Frances's* estate, at the time the respondents entered into the possession thereof, and which accrued due during the time the respondent *Frances* and her sister were maintained by the appellant, after his father's death. — The



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— The ninth exception was, for that the appellant was not allowed the sums of 40*l.* and 9*l.* 11*s.* which the respondent *John Gandy*, by his examination, admitted to have received, or which he might have received of *Sampson Couch*, being other part of the produce of the respondent's estate, within the time aforesaid. — The eleventh exception was, for that the Master, by his report certified, that the appellant, by the schedules to his answer had charged only 47*l.* 17*s.* 7*d.* as paid by him to doctors, surgeons and apothecaries for the respondent *Frances* and her sister; whereas it appeared by those schedules, that he had paid on this account for the respondent, only 40*l.* 19*s.* 9*d.* and likewise several other sums, amounting to 27*l.* 0*s.* 6*d.* — All these exceptions, his Lordship was pleased to overrule, and to make the appellant no allowance whatsoever in regard to his disbursements for physic, or on account of the respondent's sickness.

J. Willes.  
E. Green.

He therefore appealed from both the decree and order, contending, that the general rule whereby guardians are restrained from exceeding in expences the income of the infant's fortune, admits of exceptions upon particular emergencies; for if it should be laid down as an universal unalterable rule, that guardians, who (as in the present case) have used all possible endeavours to prevent such expences, yet shall not be entitled in equity to be reimbursed, no person will be induced to undertake the guardianship of infants; since he must either be guilty of a breach of his duty, or run the hazard of losing what he may expend to save the minor from immediate ruin. But if this rule be without exception, then surely it must be understood to comprehend the income received, and the expences laid out during the whole continuance of the minority; and not be interpreted in so strict a sense, as to confine guardians from laying out in the latter and more chargeable part of such minority, upon just considerations, what had been saved out of the income in the former part of it; and therefore the appellant ought to be allowed the money saved by his father during his management of the estates, and the whole income during his own management, towards reimbursing him what he had expended in the maintenance and education of the respondent *Frances*, and in necessaries on her account. That the obligation



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obligation upon minors to repay or allow guardians such sums as have been expended in cases of necessity, or for the minor's good, depends upon proof of the actual laying out the same, and not solely upon the allowing or signing accounts thereof by the minors after their coming of age; and therefore it was apprehended, that no distinction ought, in equity, to be made in the case of two sisters and coheiresses, who had received the money upon the same considerations, but that both should be made equally liable. That the decree ought not to have been varied upon arguing the exceptions, by which variation the appellant would lose upwards of six years maintenance of the respondent *Frances's* mother, and near six years maintenance and education of *William* the son; especially, as that part of the decree was agreeable to the proof in the causes. That the appellant's fourth and fifth exceptions ought to have been allowed, as the charges of schooling and education cannot be understood to be included by the bare remission of maintenance in a legacy; not only because the term does not import or signify schooling, but because it was proved, that the testator did not mean to comprehend the charges of such schooling and education. That the sums mentioned in the seventh, eighth and ninth exceptions ought to have been allowed, as being part of the income of the respondent's estate, while it was under the appellant's care and management. That the respondent's bad state of health, and the means used for her recovery, were both admitted and proved; and it was apprehended, that money laid out for infants labouring under sickness, towards their preservation and recovery, ought in equity to be allowed beyond all ordinary expences; and frequently are so allowed, altho' they may exceed the income of the infant's fortune.

On the other side, it was said to be the known rule of the Court of Chancery, to limit the allowance for the maintenance of infants within the bounds of their annual income. That the appellant was not entitled to any allowance for maintenance of the respondent during his father's life, because it appeared by his answer, not only that the respondent and her sister were sent by his father to the appellant's house, but also that his father undertook the payment of their maintenance; and as he was his father's executor and had assets, it was his business

D. Ryder.

N. Fazaker-ly.



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business to pay himself; nor was it to be doubted that he did so. That the appellant himself having proved a stated account between his father and the respondent's mother, by which all accounts were liquidated and brought to a balance on the 28th of *May*, 1706, and which was allowed to the appellant by the Master; that was both in law and equity, a bar to any new account of matters previous thereto: But if not, it appeared in proof, that the rents and profits of the estate received by Mr. *Anstis* the father, were more than sufficient to answer for the maintenance of the respondent's mother and brother, who boarded with him at his house in *Cornwal*. It was therefore hoped, that the appeal would be dismissed with costs.

DECREE  
affirmed,  
Jour. vol. 24.  
P. 507.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and order therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents 50*l.* for their costs, in respect of this appeal.

Case 23. *Charles Barlow*, Gent. - - Appellant.

*Robert Bateman*, alias *Barlow*, and *Mary*  
his Wife, *Thomas Langton* and *John*  
*Watts*, surviving Executors of *George* } Respondents.  
*Barlow*, deceased, — }

2d April, 1735.

3 Wms. 65.  
Viner, vol. 5.  
p. 88. ca. 8.  
2 Eq. ab. 214.  
ca. 8.

THE testator *George Barlow*, being possessed of a considerable personal estate, by his will, dated the 20th of *May*, 1727, devised in the words following: — “ I give and  
“ bequeath unto my kinsman *Charles Barlow*, (meaning the  
“ appellant) son of *Edward Barlow*, deceased, an infant now at  
“ school at Mr. *Phipps's*, at *Westham* in the county of *Essex*,  
“ the sum of 8000*l.* of lawful money of *Great Britain*, to be  
“ paid to him when he shall attain his age of 21 years: But  
“ in case the said *Charles Barlow* shall happen to die before he  
“ shall attain the said age of 21 years, then I give the said sum  
“ of



“ of 8000*l.* with all benefit, interest and improvement thereof,  
 “ unto my kinswoman *Mary Barlow*, (meaning the respondent  
 “ *Mary*) an infant under the age of 21 years, now being with  
 “ *Mrs. Farrington* in *Blackmoor-street* in *Southwark*, in the  
 “ county of *Surry*, to be paid to her at the day of her marriage,  
 “ in case she shall marry with any person of the surname of *Bar-*  
 “ *low*; but if she shall marry a person of any other surname, then  
 “ from and immediately after such last mentioned marriage, I  
 “ give and bequeath the said 8000*l.* and the interest, produce  
 “ and improvement thereof, unto my friend *Henry Best* of *London*,  
 “ packer. Item, I give and bequeath unto my said kinswoman  
 “ *Mary Barlow* the sum of 1000*l.* to be paid to her at her age  
 “ of 21 years, or day of marriage, which shall first happen: But  
 “ in case she shall die before she shall attain the said age of 21  
 “ years, or be married; then I give the said 1000*l.* to my  
 “ kinsman *Charles Barlow*, to be paid to him at his age of 21  
 “ years. Item, In case the said *Mary Barlow* shall marry with  
 “ any person of the surname of *Barlow*, then I give her the further  
 “ sum of 1000*l.* of like money, to be paid her on the day of such  
 “ her marriage with a *Barlow* aforesaid; but if the said *Mary*  
 “ *Barlow* shall die unmarried, or shall marry a person not bear-  
 “ ing the surname of *Barlow*; then I give the said last mentioned  
 “ sum of 1000*l.* unto the said *Charles Barlow*, to be paid as  
 “ aforesaid.” And the testator, by his will, directed that his  
 executors should, as soon as conveniently might be, lay out  
 the said several sums in bank and *South-sea* annuity stock, for  
 the benefit of the appellant and the respondent *Mary* respec-  
 tively.

Soon after the testator's death, which happened on the 4th  
 of *July*, 1727, the respondent *Mary*, not regarding the con-  
 dition or terms put upon her by the will, intermarried with  
 the respondent *Robert*, who was then an apprentice to a coach-  
 harness maker, and whose father's name was *Bateman*, and who  
 was himself christened, called and known by the name of *Robert*  
*Bateman*.

The appellant being under the age of 21, and being advised  
 that by the said marriage he became well entitled to the said  
 legacy of 1000*l.* so conditionally devised to the respondent  
*Mary* as aforesaid; in *Michaelmas* term, 1728, exhibited his bill  
 in



1735.

in the Court of Chancery against the respondents *Robert* and *Mary* his wife, and against the executors, to be decreed, *inter alia*, to the said sum of 1000*l.* and the interest and produce thereof.

To this bill the executors put in their answer, and thereby confessed they had sufficient assets of the testator to answer the legacies so devised as aforesaid; and that they had, in pursuance of the testator's will, and in discharge of their trust, laid out a sum of 11,796*l.* 5*s.* in the purchase of 5000*l.* bank, and 5000*l.* *South-sea* annuity stock, and submitted to pay the legacies as the Court should direct. And the respondents *Robert* and *Mary* his wife having put in an answer, the respondent *Robert* thereby confessed, *that on the occasion of his marriage, and not before, he assumed and took upon him the name of Barlow, and that his father's name was Bateman; and that he assumed and took upon him the name of Barlow, in order to entitle himself to the said sum of 1000*l.* devised to the respondent Mary by the testator, upon the condition aforesaid.*

The cause being at issue, witnesses examined and publication passed, came on to be heard before the Master of the Rolls on the 13th of *July*, 1730, when his Honour was pleased to order and decree, that the appellant's bill, as to the demand of the 1000*l.* devised to the respondent *Mary*, upon the condition aforesaid, should be dismissed; the said *Mary* having married a person who bore the name of *Barlow*: And this decree was soon after signed and inrolled.

But doubts still subsisting as to the right to this legacy, the respondent *Robert*, by the name of *Robert Barlow*, and *Mary* his wife, in *January*, 1731, exhibited their bill in the Court of Chancery against the executors and residuary legatees, and against the appellant, praying to be paid both the legacies of 1000*l.* each, devised to the respondent *Mary*, by the testator's will as aforesaid.

To this bill the appellant by his answer insisted, that the respondent *Mary* had, by her marriage, forfeited the benefit of the legacy of 1000*l.* *conditionally* devised to her, and that he, the appellant, on account of the said marriage, became entitled thereto.



The other defendants having put in their answers, and issue being joined, witnesses examined, and publication passed, the cause came on to be heard before the Master of the Rolls, on the 22d of *July*, 1734, when his Honour thought proper not to vary his former decree, with respect to the said *conditional* legacy of 1000*l.* devised to the said *Mary* as aforesaid, she having intermarried with a person who bore the name of *Barlow*: And therefore, gave the usual directions for the payment of both the legacies. But this decree was not signed or inrolled.

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The appellant, however, appealed from both the decrees; J. Strange. insisting, that it was the manifest intention of the testator, J. French. that a person of his own name should, by marriage with the respondent *Mary*, have the benefit of the legacy of 1000*l.* conditionally devised to her; or in default thereof, that the appellant should have it: For by the express words of the will, this legacy was given to the respondent *Mary*, upon a condition precedent, namely, *that she should marry a person of the surname of Barlow*; and that on the day of such her marriage with a *Barlow*, the legacy so devised was to be paid to her. But as she had not performed this express condition, it was submitted, that she could not be entitled to the legacy. That the respondent *Robert* could not, previous to his marriage, legally assume the surname of *Barlow*, otherwise than by act of Parliament, so as to entitle himself to this legacy; but if his assuming that name in the manner he had done, should be sufficient to entitle him, he might, in the same manner, after receiving the legacy, reassume his own legal name, and thereby wholly frustrate and defeat the testator's intention. It was therefore hoped, that for these reasons, both the decrees, so far as they related to this legacy, would be reversed.

On the other side it was said, that as the last decree was not signed and inrolled, no appeal lay from it; and as to that part of the first decree, of which the appellant complained, it was apprehended to be very just and right. Because conditions annexed to legacies, which go in restraint of the freedom of marriage, are considered as void by the civil law, and are not at all favoured in Courts of Equity; and because the intention of the testator, in this case, was fully complied with, by the respondent *Robert's* bearing the name of *Barlow*, before and at



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the time of, and ever since his marriage; which was all that was required by the testator's will.

DECREE  
reversed,  
Jour. vol. 24.  
P. 511.

BUT after hearing counsel on this appeal, it was DECLARED, that the appellant was well entitled to the legacy of 1000*l.* conditionally bequeathed to him by the will: And therefore it was ORDERED and ADJUDGED, that the decree of the 13th of *July*, 1730, should be reversed; and that it should be referred to one of the Masters of the Court of Chancery, to enquire what part of the testator's personal estate had been laid out by his executors in bank stock and *South-sea* annuity stock, and what proportion thereof, and of the produce thereof, belonged to the appellant, in respect of the said legacy of 1000*l.* And it was further ORDERED, that the said Court of Chancery should give the necessary directions for taking the said account, and for the transfer and payment of so much of the said bank stock and *South-sea* annuity stock, and of the produce thereof to the appellant, as should appear to be his proportion of the same, in respect of the said legacy. And it appearing, that the decree of the 22d of *July*, 1734, had not been signed by the Lord Chancellor, it was DECLARED, that the appeal from that decree was brought irregularly; and it was therefore ORDERED and ADJUDGED, that the same, so far as it complained of the said last mentioned decree, should be dismissed; but with liberty notwithstanding, for all parties to apply to the Lord Chancellor, if they should think fit, to rehear the cause\*.

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\* The reporter of this case has taken no notice of the reversal of the decree:



Henry Fevers, Esq; - - Appellant. Case 24.

Margaret Fevers, Widow of John Fevers, Esq; deceased, Augustine Fevers and Arthur Blenerhasset, Esq; Executors of the said John Fevers, } Respondents.

18th April, 1735.

JOHN Fevers, the appellant's father, being seised in fee of several lands, tenements and hereditaments in the county of Clare in Ireland, by articles, dated the 19th of April, 1692, in consideration of a marriage then intended, and shortly after had, between him and Ellen Fitzgerald, and of 1000*l.* marriage portion, did, amongst other things, covenant with Augustine Fitzgerald, Esq; the lady's father, to limit and settle all and singular the premisses to and upon him the said John Fevers for life; remainder to the first and every other son of the marriage in tail male; with divers remainders over; and without any power of making a jointure on any second wife he might marry.

Grounds and Rudiments of Law and Equity, p. 19. ca. 17. 2 Eq. ab. 54. ca. 13. cited in both books by the name of Ivers v. Ivers.

There was issue of this marriage the appellant, the eldest son, and several other sons and daughters. But the articles were never carried into execution, nor any settlement made pursuant thereto; and the appellant's mother dying during his infancy, he had not the least notice of the articles, the same being industriously concealed from him; so that the said John Fevers passed for the absolute owner of the inheritance, and accordingly took upon himself, from time to time, both to mortgage and sell a considerable part of the premisses, to the value of 10,000*l.* and upwards.

The appellant having attained 21, in the year 1718, the said John Fevers his father, pretending to be seised in fee of the premisses, proposed to the appellant to join with him in making a settlement of what was left undisposed of, being about the clear yearly value of 500*l.*; and refusing to make any allowance to the appellant for his maintenance or support, if he



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he should decline joining in such settlement; the appellant, under these circumstances, and having no notice of the articles, was prevailed upon to join in executing certain deeds of lease and release, dated the 3d and 4th of *August*, 1718; whereby the premises were limited, as to part, to the use of the appellant for life, for his support and maintenance; and as to the residue, to the use of the said *John Fevers* for life; remainder, as to the whole, to trustees for a term of 600 years, in trust to raise 6000*l.* for portions and maintenance for younger children; remainder to the appellant for life, *sans* waste; remainder to trustees to preserve the contingent remainders; remainder to his first and every other son in tail male; with like remainders to the second and other sons of the said *John Fevers*, and to their first and other sons in tail male; remainder to the said *John Fevers*, his heirs and assigns for ever. In this deed was contained a proviso, that it should and might be lawful to and for the said *John Fevers*, and every of his said sons, when in possession of the premises, by indenture, under their respective hands and seals, testified by three or more credible witnesses, to grant, limit, or appoint any particular parcels of the said lands and premises, as a jointure to any woman or women he or they should thereafter respectively marry, for her or their life or lives, for her or their jointure; so as the premises so to be limited did not exceed 200*l. per ann.* and so as no such jointure should be made dispunishable of waste: And also power to the said *John Fevers*, by and with the consent and approbation of the appellant, to revoke, annul and make void the said settlement, or any part thereof, or any of the uses, grants, or limitations thereby made.

Soon after perfecting this settlement, the appellant's father intermarried with the respondent *Margaret*, who was then a widow with several children, and entitled to no other fortune than two several leasehold farms in the counties of *Limerick* and *Tipperary*, subject to considerable reserved yearly rents. But previous to this marriage, *John Fevers* executed a bond to one *John Jephson*, in the penalty of 2000*l.* conditioned that he should, after the marriage, settle lands of the value of 200*l. per ann.* upon the respondent *Margaret* for her life.

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The said *John Fevers* never executed any deed for settling a jointure upon the respondent *Margaret*, nor was he ever called upon by her, or her trustee so to do; but upon several occasions after his marriage, he laid out considerable sums of money for her benefit and advantage, and particularly 1300*l.* as a fine paid upon the renewal of one of her said leasehold estates. However, in his last illness, he directed a deed to be prepared and ingrossed, for limiting a particular part of the premises upon her for her jointure; but by some accident, this deed was never executed.

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On the 3d of *December*, 1729, *John Fevers* died; having first made his will, and thereby, amongst other things, bequeathed to the value of 800*l.* to the respondent *Margaret*, and thereof appointed the respondents *Blenerhasset* and *Fevers* executors.

Notwithstanding these bequests so made to the respondent *Margaret*, and of which she immediately possessed herself, together with the several sums before laid out for her benefit, far exceeded the sum of 2000*l.* the penalty of the said bond, and was a consideration more than adequate to any provision which she could claim under it; yet in *Easter* term, 1730, she exhibited her bill in the Court of Exchequer in *Ireland*, against the other respondents and the appellant; praying, either that the executors might, out of the testator's personal estate, pay and satisfy the said 2000*l.* with interest for the same since the testator's decease, or that she might be put in possession of so much of the said settled premises as should appear to be of the value of 200*l.* *per ann.* and be paid the arrears thereof grown due since the testator's death.

The appellant, by his answer to this bill, insisted upon the benefit of the articles in 1692, and that he had never seen or been made acquainted with, or had the least notice of them, at the time of his being drawn in to execute the settlement in 1718; that as his title under the articles was not disclosed, but industriously concealed, the settlement of 1718, was a fraud upon him, and he was not to be bound thereby, nor obliged to make any settlement upon the respondent *Margaret*.



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The cause being at issue, and witnesses examined, was heard upon the 28th, 30th, and 31st of *May*, 1733; and the Court having taken time to consider thereof, were afterwards, upon the 26th of *June* following, pleased to order and decree, that the appellant should, by sufficient deeds, convey to and settle on the respondent *Margaret*, so much of the said premises as should in the whole amount to the clear yearly value of 200*l.* to be by her held and enjoyed as a jointure, for and during the term of her natural life; and that the appellant should account with her for the arrears of the said 200*l.* since the death of his father; and that it should be referred to the Chief Remembrancer to state and audit the said account.

N. Fazakerley.

W. Hamilton.

From this decree the present appeal was brought; and on behalf of the appellant it was insisted, that he was drawn in, by fraud and concealment of the articles of 1692, to join in the settlement of 1718, and ought not therefore to be bound by it. That by this settlement, *John Fevers* had only a power to limit any particular parcel of the lands therein mentioned, not exceeding 200*l.* a year, as a jointure, but he had never made use of that power, or executed any deed for that purpose; and it seemed unreasonable to compel the appellant to make a settlement, which his father, who had the power, never thought fit to do. That the bond being only conditioned for the settlement of a jointure of 200*l.* without referring to any particular estate out of which such a provision was to be made, ought not to create any real or specific lien upon the lands comprised in the articles, under which the appellant appeared to be a purchaser for a valuable and meritorious consideration. Besides, the respondent *Margaret* relied upon this bond, without having any deed executed pursuant to the power in the settlement, and therefore she ought to claim a satisfaction out of the testator's personal estate; and if she gave credit, as it was apprehended she ought, for what she had already received, she would have more than an adequate satisfaction for her demand under the bond. It was therefore prayed, that the decree might be reversed.

D. Ryder.

J. Browning.

On the part of the respondent *Margaret*, it was contended, that she was a purchaser for a valuable consideration of her jointure of 200*l.* a year; and that not only by her marriage, which



which alone has always been esteemed a sufficient consideration, but also by her personal and leasehold estates. That Courts of Equity constantly decree the execution of powers in favour of purchasers, not only against the persons who for valuable considerations agree to execute them, but against those in remainder also; and as the bond ought to be considered as an equitable execution of the power, it ought to be made effectual by the assistance of a Court of Equity; and especially, as it appeared by the engrossment of the deed, that the testator had not only an intention to execute the power legally, but had likewise fixed upon the particular lands to be settled for that purpose. That by the dates of the settlement and bond, both being on the same day, and by the draught of the deed prepared by the testator's direction, it appeared, that the intention of the parties to the marriage agreement was, that it should be performed by an execution of his power; and therefore it was hoped, that the decree would appear to be right and just, and consequently be affirmed.

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BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondent *Margaret's* bill, as against the appellant, should be dismissed: And it was further ORDERED, that it should be referred to the Deputy Remembrancer of the said Court of Exchequer, to compute interest for 2000*l.* the penalty of the bond given by the appellant's father, conditioned to settle a jointure of 200*l. per ann.* on the respondent *Margaret*, from the time of filing the said bill, and to tax her costs in the said Court; and that the said sum of 2000*l.* and the interest thereof and costs, should be paid to her by the respondents the executors, out of his personal estate, in a course of administration: And in case they should not admit assets, it was further ORDERED, that it should be referred to the said Deputy Remembrancer, to take an account of the personal estate of the said testator, which had come to the hands of the respondents the executors, or either of them, or of any other person by their or either of their order, or to their or either of their use respectively; in taking of which account, they were to have all just allowances; and the said Deputy Remembrancer was at liberty to state any matter relating to the said personal estate specially to the Court, if there should be occasion:

DECREE  
reversed.  
Jour. vol. 24.  
P. 523.



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occasion: And it was further ORDERED, that the said Court of Exchequer should give the proper directions for taking the said accounts, and payment of the said money, in pursuance of this order.

Case 25. *Robert Lowther, Esq;* - Appellant.  
*Michael Raw, and several Others,* - Respondents.

24th April, 1735.

IN the year 1613, *Philip Lord Wharton*, and *Sir Thomas Wharton*, Knt. his son and heir apparent, or one of them, was seised in fee, and Lord of the several customary manors of *Kirkby Stephen, Wharton, Nateby, Shapp, Tebay, Langdale, Bretherdale, Reagill, Sleagill, Longmarton, and Bampton Car-bullan*, in the county of *Westmorland*; in which manors were several customary messuages, lands and tenements, holden of the Lord or Lords of the said manors respectively, as tenant-right, or customary estates of inheritance, descendible from ancestor to heir, according to the customs of the said manors respectively, on payment of fines or gressoms, on change of the Lord by death only, called *general fines*, and on change of the tenants by death or alienation, called *dropping fines*; and upon payment of certain antient annual rents and boons, and on doing and performing suit and service at the courts holden for the said manors, respectively, according to the respective customs thereof.

Both the general and dropping fines payable by the customary tenants of the said respective manors, were formerly, and had time out of mind been reasonable arbitrary fines, at the will of the Lord for the time being, until the year 1613; when the said *Philip Lord Wharton*, and *Sir Thomas Wharton*, in consideration of divers large sums of money paid them by several of the customary tenants of the said manors, and for avoiding the frequent differences and disputes which happened in relation to the payment of the said fines; came to an agreement with the several customary tenants touching the settling, fixing



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fixing and ascertaining, not only the *quantums* and reasonableness of the said fines, and the time of payment thereof, but also touching the Lord on whose death the said general fine should be payable: And thereupon, by ten several indentures of agreement, every of them respectively bearing date in the months of *August* and *September*, in the said year 1613, and respectively made and executed by and between the said *Philip Lord Wharton*, and *Sir Thomas Wharton* of the one part, and several of the then tenants of the customary estates held of the said manors respectively, of the other part; it was witnessed, that whereas the said customary tenants, parties to the said indentures respectively, and their several ancestors, or those whose customary estates they respectively had, time out of mind, and then did severally hold to them and their heirs, all the several messuages, lands and tenements, with their appurtenances, in the aforesaid manors, then being in the several occupations of the said tenants of the said manors, or of their several assigns, of the aforesaid *Philip Lord Wharton*, and *Sir Thomas Wharton*, Knt. or one of them, and of their ancestors, Lords of the several manors aforesaid for the time being, by and according to the custom of tenant-right, there used time out of mind of man, within the said several manors respectively; by the payment of certain annual rents, suit of court and services, for the said tenements and premises respectively, usual and accustomed; and by paying upon the death of the said Lord only, and change of the tenant by death or alienation, such reasonable fine, arbitrary and uncertain, as between the Lords and tenants for the time being, should or might be compounded for and agreed upon reasonably: They the said *Philip Lord Wharton* and *Sir Thomas Wharton*, in consideration of several sums of money mentioned in the said several indentures, amounting together to 365 *l.* 3 *s.* 7 *d.* paid them by the said several tenants, parties to the said indentures respectively; and in consideration of the honourable care and special favour they bore to the said tenants, and the better to ratify, establish and confirm the several customary estates and interests of inheritance of the said tenants, and their heirs and assigns forever, in their several messuages, lands, tenements and hereditaments, according to the said custom of tenant-right, during all the said time of memory, then or theretofore so had and used as aforesaid, and in all points as theretofore had been

accustomed,



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accustomed, *without any violation or alteration thereof*; saving only, that the fines and gressoms might from thenceforth become certain and known, for avoiding of suits which thereafter might ensue; were agreed, and did thereby for them, their heirs and assigns for ever, as well declare and acknowledge, that all the said customary estates of the said tenants respectively then were, and time out of mind had been, and for ever thereafter should be, and of right ought to be, reputed, adjudged and taken to be customary lands and hereditaments of inheritance, according to the nature of the antient and laudable custom of tenant-right; as also did thereby covenant, grant and agree to and with every of the said tenants, parties to the said indentures, their respective heirs and assigns, that for ever thereafter they should severally, according to their several possessions or occupations in the said customary estates, have, hold and enjoy the same, with their appurtenances, to them and their heirs and assigns, according to the antient and laudable custom of tenant-right; and that also in every point according to the custom theretofore used and observed in the said manors, by the yearly payments of their rents due for the same, and by doing and performing such duties, customs and services, for the same as had been thentofore used and accustomed, saving only for the manner of payment of the fines and gressoms as therein after ensueth; any thing therein, or otherwise to the contrary notwithstanding: And that without any let or hindrance of the said *Philip Lord Wharton*, or *Sir Thomas Wharton*, their, or either of their heirs or assigns, or any person claiming by, from, or under them or either of them, in any wise: And the said *Philip Lord Wharton*, and *Sir Thomas Wharton*, did thereby further covenant, grant and agree, that they, nor either of them, their, nor either of their heirs or assigns, nor any of them, should not, at any time or times thereafter, claim, demand, or have any other or more, or greater fine or fines, or gressoms of the said respective tenants, nor of their nor any of their heirs or assigns, nor of any of them; save *upon change of the Lord for the time being by death only*, and upon change of the tenant for the time being by death or alienation, than ten times so much as one year's antient annual rent, payable by the said tenants respectively within the said manors of *Kirkby Stephen, Wharton, Neatby, Shapp, Reagill, Sleagill, Longmarton and Bampton Carbullan*, and eight years value of such



such antient annual rent, payable by the said tenants respectively, within the said manors of *Tebay, Langdale and Bretherdale*; and that without any increase or further demand whatsoever, for or in any wise concerning any fine or gressom, for or in respect of the said customary estates, or any part thereof; and that the said *Philip Lord Wharton*, and *Sir Thomas Wharton*, or one of them, had good power and right to covenant, agree and grant, to and with the said tenants respectively, their heirs and assigns, in manner and form aforesaid; and that they, their heirs and assigns, would at all times thereafter, at the costs and charges of the said tenants, or of any of their heirs or assigns, do and execute any further acts or assurances for the perpetual performance thereof, at all times thereafter. And the said several tenants, parties to the said indentures respectively, did severally covenant to pay the said ten years and eight years fine and gressom, according to the true intent and meaning of the said indentures, at and upon such two yearly feast days of *St. Martin the Bishop*, in winter, and *Pentecost*, by equal portions, as should from time to time successively and next happen after the same fine or gressom should grow due or payable, by the true meaning of the said indentures, by or by reason of the death of the Lord of the premises, or by, or by reason of the death of the tenant for the time being, or of the alienation for the time so happening.

These several indentures, and all the clauses, covenants and agreements therein contained, were by two several decrees of the high Court of Chancery, made in *Hilary* term, 1613, by consent of all the parties thereto, ratified and confirmed, and decreed to be observed and performed for ever thereafter.

The said manors, by several descents, came to *Thomas*, Marquis of *Wharton*, on the death of *Philip Lord Wharton*, his father; and he thereupon readmitted all the tenants to their estates, and assessed and received a general fine from them on that occasion.

In 1715, the Marquis died seised and in possession of the said manors; and thereupon a general fine was paid by all the tenants, to *Philip*, Duke of *Wharton*, his only son and heir, who was the last general admitting Lord.

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In the year 1721, the Duke being seised of all the said several manors, granted and conveyed the same to certain trustees, upon trust, to be sold for payment of his debts; and some time in the year 1729, the appellant purchased all the said manors, with the rents, fines and services thereto belonging, of the trustees, for 30,400*l.*; and accordingly entered upon the possession thereof, and received the dropping fines, and the annual rents of the respective tenants, as the same from time to time became due and payable.

The Duke, after the appellant's purchase, withdrew himself out of this kingdom and died in *Spain*, on the 6th of *June*, 1731; whereupon the appellant conceiving that a general fine was become due to him by the death of the Duke of *Wharton*, the last general admitting Lord, held several Courts customary, or Courts of general dimissions, in and for the said several manors, and set and assessed a general fine upon all the customary tenants thereof.

The respondents and all the other tenants of the said several manors, who were owners of the customary lands or tenements belonging to the several customary tenants, parties to the said indentures of 1613, refusing to pay the said general fine so assessed by the appellant; he, in *Hilary* term, 1731, exhibited his bill in the Court of Chancery against the respondents, setting forth the said indentures and decrees; and insisting, that by the custom of the said several manors for time immemorial, a general fine was due upon the death of the last general admitting Lord, who continued still to be Lord till the time of his death, with regard to the payment of a general fine, notwithstanding he had sold or aliened the manors before his death; and that such custom was not varied or altered by the said indentures or decrees; and therefore prayed, that the respondents and all other the customary tenants, who claimed any customary estate within the appellant's said manors, which were the estates of any of the tenants, parties to the said indentures of 1613, might be decreed to pay the general fines assessed upon them for their said estates, as due to him on the death of the late Duke of *Wharton*, the last general admitting Lord, or such other fines as became due according to the said indentures and decrees, or such other fines as the Court should  
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adjudge,



adjudge, together with interest from the time the same ought to have been paid; and that the appellant might have the benefit of the said former decrees; and that the indentures of 1613, and the decrees thereon, might be carried into execution.

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The respondents, by their answers, admitted that they were severally seised of several customary estates within, and holden of the said manors, as tenant-right, or customary estates of inheritance, descendible from ancestor to heir, according to the customs of the said manors, as the same were explained, fixed and ascertained by the said indentures of 1613, and the decrees made thereupon; and said, that however the customs of the said several manors might have been before the said indentures and decrees, with regard to the payment of a general fine on the death of the last admitting Lord, (which the respondents did not admit, but on the contrary insisted, that the fines, by the antient custom, were payable on the death of the Lord for the time being in possession only;) yet, by the said indentures it was clear and established, that the said general fines were now payable on the death of the Lord for the time being only.

The cause being at issue, the appellant examined several witnesses, well acquainted with the nature and practice of customary manors in the counties of *Cumberland* and *Westmoreland*; who proved, that after the death of the last general admitting Lord or Lady of any customary manor, a general fine became due and payable from all the customary tenants of the manor to the next succeeding Lord, whether he came in by descent or purchase; or whether such last general admitting Lord was, at the time of his death, in possession of the manor or not; he being considered, with respect to the continuance of the tenants estates, as Lord during his life. The appellant also proved and exhibited several indentures between the Lords and tenants of the neighbouring manors, for reducing the fines from arbitrary to certain, wherein the like covenants and agreements were inserted, as in the before mentioned indentures of 1613.

On the 17th of June, 1734, the cause came on to be heard before the Lord Chancellor *Talbot*; when, after long debate of the



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matter, his Lordship refused to admit the appellant's exhibits as evidence, and declared he saw no cause to give the appellant any relief in equity; and therefore ordered that the matter of the appellant's bill should, from thenceforth, stand absolutely dismissed, but without costs.

J. Willes.

D. Ryder.

The appellant therefore appealed from this decree, insisting, that he had proved, and that there was no evidence to the contrary on the part of the respondents, that by the general custom of all customary manors, a general fine was due on the death of the last general admitting Lord, whether he died seised or not. That from the recitals in the indentures of 1613, it appeared to have been the clear intent of the parties, not to vary, but to establish the custom of tenant-right estates in every respect, except what related to the certainty of fines, and the particular days of paying them after they arose; and one principal intent of those deeds was thereby expressly declared to be, to confirm for ever the tenants estates, according to the custom of tenant-right, and in all points as had been accustomed, without any violation or alteration thereof; save only, that the fines and gressoms might from thenceforth become certain and known, for the avoiding of suits, which was the only exception there mentioned. That the words in the covenanting part of these indentures, which were insisted on to vary the custom, *i. e. on the change of the Lord for the time being by death only*, were synonymous and equivalent expressions with the words in the recital, *i. e. on the death of the Lord only*; and therefore, as there was no difference in the sense of these expressions, it necessarily followed, that the original custom, touching the occasion on which general fines arose, was not altered, or controuled by this phrase; but the respondents had made a distinction, where there was no difference, and had endeavoured, under that colour, to abrogate the ancient custom. That the meaning of the words was best understood by those who lived among these customary manors, and were acquainted with the nature of the estates, and the language of the country where they lie; and accordingly the appellant's witnesses fully proved, that the last general admitting Lord was, notwithstanding his alienation, considered in respect to the continuance of the estate of the tenants, as the Lord



Lord for his life: And this meaning was confirmed by the sense universally put upon the same words, in deeds of the same tenor, respecting other tenant-right manors. For which reason it was apprehended, that those other deeds should have been permitted to be read, in order to compleat the evidence of the witnesses, who spoke to the practice and usage (the best interpreter of the words) in other manors, where the like deeds had been made. That the nature of the tenure could not, by law, be varied, or any new tenure established, by any agreement between the Lords and tenants, since both their rights were founded on custom only; and whatever agreement might subsist between the parties, the Lord could never enter for a forfeiture, and gain a legal right to the estate, for a tenant's not paying a fine upon a contingency different from the custom; which therefore, in law, neither determined the estate, or gave a right to the fine.

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On the other side it was said, that the foundation of the appellant's bill was, that before the indentures of 1613, the custom of the manors was, that a general fine was payable upon the death of the last general admitting Lord, whether he died in possession or not; and yet, if those indentures were out of the case, and this pretended custom ought now to be enquired into, there was not sufficient evidence in the cause to support it. But if there were any doubt or uncertainty, as to the custom of these manors before the indentures of 1613, in relation to the payment of a general fine, yet such custom was explained, fixed and settled by those indentures, and the decrees confirming them; the general fine being thereby agreed and established to be due and payable *on change of the Lord for the time being, by death only*, and not otherwise; which words [Lord for the time being] were made use of in the indentures, in contradistinction to the term or expression of [the last general admitting Lord] which was an expression as well known and used at the time of making the indentures, as the words [Lord for the time being:] And as those indentures were entered into upon a valuable consideration paid by the tenants, and for preventing all disputes touching the general fine, as well as for ascertaining the same for the future; it was submitted, that loose and uncertain evidence ought not, at this great

J. Verney.  
N. Fazakerley.



1735.

DECREE  
reversed.  
Jour. vol. 24.  
P. 530.

great distance of time, to be set up to overturn the plain words and meaning of the indentures, and to make the custom thereby established precarious and uncertain.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed: And it was DECLARED, that the appellant became entitled to a general fine upon the death of the late Duke of *Wharton*; and that the respondents ought to pay the same, in respect of their customary estates held by them, according to the rates specified in the several indentures of *August* and *September*, 1613. And it was further ORDERED, that it should be referred to a Master of the Court of Chancery, to enquire whether the said fines, so payable by the respondents, had been rightly assessed, and to state the same; and if they had not been rightly assessed, then the Master was to take an account what the same amounted to, according to the said indentures, and the same were to be paid by the respondents to the appellant: And that the said Court should give further directions in pursuance of this order.

Cafe 26. *John Giffard*, Clerk, - - - Appellant.  
*John Webb*, - - - Respondent.

5th May, 1735.

THE appellant was Rector of the parish of *Stoke* next *Guildford*, in the county of *Surry*; and the respondent was a farmer and occupier of lands in the same parish.

In *Michaelmas* term, 1729, the appellant exhibited a bill in the Court of Exchequer against the respondent, setting forth, that he was entitled to all the tithes arising in the parish, or to some recompence or satisfaction in lieu thereof; and that the respondent, from the year 1726, to the time of exhibiting the bill, had occupied great quantities of pasture land, on which he kept great numbers of sheep, from which he had lambs yeaned, the tithe whereof was demanded by the bill.



The respondent, by his answer, admitted the appellant to be Rector, and that the respondent occupied a farm and lands in the parish, consisting of 28 acres of meadow, and 240 acres of arable land; but no pasture ground, except as his arable land came round in the course of husbandry to be sowed with grass seeds, when sown with summer corn: He also admitted, that about *Michaelmas*, he bought a number of ewes with lamb, and had from them a great number of lambs, which he sold; but insisted, that the appellant was not entitled to tithe in kind of lambs, for that there had been the following antient usage and custom approved within the parish, *viz.* that every occupier of lands and tenements within the said parish, having a lamb or lambs yeaned within the said parish, ought, and for time out of mind had used to pay the Rector of the said parish for the time being, or his lessee, for every lamb so yeaned within the said parish, the sum of three pence and no more, as a *modus*, and in lieu and full satisfaction of the tithe of every such lamb; and that the same was payable yearly on St. *Mark's* day, or so soon after as demanded; and that the same had been accepted by the Rectors of the said rectory for the time being, in lieu of the tithe of lambs.

On the 14th of *July*, 1731, the cause came on to be heard; when it was, among other things decreed, that it should be referred to a trial at law, to try the *modus*, as set forth and insisted on by the defendant in his answer, the then next Lent Assizes for the county of *Surry*, in a feigned action; and the usual directions were given for that purpose.

This decree was made by two of the Barons only; and therefore, in order to have the opinion of the whole Court, the appellant by petition alledged, that he conceived himself aggrieved by the said decree, for that admitting the *modus* to be in fact as insisted on, yet that the same was void in law, and as such ought not to be allowed; and to have a trial of that, which in itself was void in law, would be fruitless and vain; and therefore prayed that the cause might be reheard, as to the demand of tithe lambs.

This petition was argued before all the Barons on the 29th of *November*, 1731; and they being of opinion, that the said



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modus for tithe lambs was not a void modus in law, refused to grant a rehearing on that point, but left the appellant to try the modus at law, if he thought fit.

The appellant declining to go to a trial pursuant to the said orders, it was, on the 28th of *November*, 1732, ordered, that the appellant should shew cause, at the setting down of causes after *Michaelmas* term, why the modus, as insisted on, should not be taken *pro confesso*: And no cause being shewn, that order was, on the 9th of *December* following, made absolute. And on the 8th of *February*, 1732, it was ordered, adjudged and decreed, that so much of the appellant's bill as related to his demand of tithe lambs in kind, should be dismissed with costs.

N. Fazaker-  
ley.

C. Clarke.

From these decrees, orders and proceedings, the present appeal was brought; and on behalf of the appellant it was contended, that the issue to try the modus ought not to have been directed, before the objections to the validity and legality of the modus were considered by the Court; because, if the objections were allowed, there had been no foundation to send such issue to be tried. And on the other hand, if such issue were tried, and a verdict obtained, establishing the fact of the modus, and afterwards, on hearing the objections, the Court should be of opinion, that it was not a good modus; the parties would then have been put to great charge and trouble, to no purpose. It was, however, submitted, that after the issue was taken *pro confesso* against the appellant, the objections ought to have prevailed, and the modus been set aside: Because a custom or usage to pay a sum of money in lieu of tithes, must be immemorial; but if it can be shewn by evidence, or from any thing in the nature of the payment, that it is not ancient and immemorial, then it is not a modus, but only a composition; which may bind the Parson who makes it, but cannot bind the successor, without his consent. It is well known, that in ancient times, and long within the time of legal memory, the price of cattle and all other commodities was so much lower than at present, that a lamb which may now be worth 2s. 6d. would not, 200 years ago, have been worth more than 6d. or in some such proportion; But in the present



present case, the sum of 3*d.* insisted on to have been anciently and immemorially paid in lieu of the tithe of every lamb (which sets the price of every lamb at 2*s.* 6*d.*) is so near the value of such tithes, even at this day, that it proves itself to be a modern composition only, and not an ancient, customary, immemorial payment or modus; and therefore ought not to bind the appellant, who had a right to his tithes in kind.

1735.

On the other side it was argued, that the modus being a matter of fact, if in any wise doubtful, was properly triable by a jury; especially as the appellant, at the hearing of the cause, refused to admit the fact of such modus: And the Court would not bar the appellant of his right to tithes, until the respondent had established the fact of the modus he had insisted on, in the most solemn manner, by a trial at law. As to the objection, that the modus upon the state of it was void, and ought not to be allowed; and that therefore the trial of such an issue would be vain and fruitless: The ground of that objection seemed to be, that the modus was so great, and so near the value of the tithable matters for which it was paid, that it could not be presumed to be well established, as a modus or prescriptive payment, but must be a modern composition, considering the decrease of the value of money for two or three centuries past: But this objection arising upon a matter of fact, was very proper to be considered by a jury, who would enquire as to the value of lambs in the place where this controversy arose. And therefore it was hoped, that the decrees and orders would be affirmed, and the appeal dismissed with costs.

J. Willes.  
J. Strange.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decrees and orders therein complained of, affirmed.

DECREES  
affirmed.  
Jour. vol. 24,  
P. 542.

The



- Case 27. The Honourable *Henry Berkley*, Esq; }  
*Jane Chaplyn*, Widow, *Robert Lack-* }  
*ford*, *Mary Bardwell*, *James Balls*, } Appellants.  
*Thomas Buttrice*, *Francis Proctor* and }  
*William Rix*, - - - }  
*John Fox*, Clerk, and the Dean and } Respondents.  
Chapter of *Norwich*, - - - }

7th May, 1735.

Bunb. 327.

THE appellant *Chaplyn*, was tenant for life of the manor of *Lakenham*, and the lands thereto belonging, and of some other lands within the manors and parishes of *Eaton* and *Amringball*, in the county of *Norfolk*; the appellant *Henry Berkley*, was seised of the reversion in fee of the said manor and lands; and the other appellants were tenants or occupiers of the said lands: And all these several manors of *Lakenham*, *Eaton* and *Amringball*, were, at the time of the Conquest, antient demesne lands of the crown, as appears by doomsday-book.

In the year 1100, King *William Rufus* and *Henry I.* granted two of these manors, viz. *Lakenham* and *Amringball*, to God and the church of *Norwich*, and *Herbert* then Bishop there, who had founded the cathedral church, to hold as freely as in the King's hands. Whereupon, the Bishop instituted monks in the said church, and granted or appointed the said manors of *Lakenham* and *Amringball*, amongst other manors and lands, for the support and maintenance of the said monks. And afterwards, King *Henry I.* granted to God and the church of *Norwich*, and to *Herbert* the Bishop, and to the monks of the said church, the manor of *Eaton* adjoining to the said manor of *Lakenham*.

King *Henry II.* King *John*, *Henry III.* and *Edward I.* by several charters, (all of them reciting the charters of King *William Rufus* and *Henry I.* to Bishop *Herbert*) confirmed the same, as also the said Bishop's grant to the monks; and the same



same was likewise confirmed by Pope *Adrian*, in the year 1115, by Pope *Alexander III.* in the year 1176, by *Gregory X.* in the year 1273, and by several Bishops of *Norwich* succeeding Bishop *Herbert*; in all which charters and confirmations of the Popes and Bishops, the manors of *Lakenham* and *Amringball*, and the churches and tithes were expressly mentioned and confirmed.

1735.

According to the then constitution of the church of *England*, the King and all his subjects might give or grant their tithes to what religious house or parson they pleased, and so it continued till the year 1200; and until that time all patrons of churches, as well lay patrons as religious, collated their own clerks, that is, by investiture from their own hands, without presentation or institution; and the religious houses generally placed a monk of their house in their churches, until the Pope at his councils, and the national synods here, began to forbid the parochial clergy from taking any tithes or churches from the hands of laymen by investiture, without the consent of the Bishops. And although the King gave some allowance to these Canons, yet the practice of patrons investing their clerks in their churches, and disposing of their tithes as they pleased, continued until the Lateran Council in the year 1215. Then the lay patrons began to obey those canons, and the religious patrons, where they held manors with the tithes, obtained licences from the Bishops, to hold their churches *in proprios usus*, and to serve the same by chaplains of their own, removeable at pleasure. The monks at *Norwich*, obtained several of such licences from *John de Grey*, Bishop of *Norwich*, to hold such of their churches of which they had the advowson and benefice, to their own proper uses; and particularly the said Bishop *De Grey*, between the years 1200 and 1214, by his charter of appropriation, did appropriate the said church of *Lakenham* to the priory of *Norwich*; and granted licence to the said priory and convent, to enter upon the said church whenever it should be void, and to cause service to be performed therein by their chaplains, removeable at their pleasure.

By these licences and grants, the church of *Lakenham* became united, or appropriated to the said priory of *Norwich*; and King *John*, *Henry III.* and *Edward I.* by their several grants or charters, confirmed to the said prior and monks of *Norwich*,



1735.

all gifts and liberties whatever, before given or granted to them; by which means they became parson *imparsones*, and perpetual incumbent in this church, without institution and induction; and no lapse could ensue or fall to any succeeding Bishop, or to the Crown. The Crown and Bishops being bound by the said charters.

Several papal orders being issued out for the supplying parochial churches with secular priests, the prior and convent of *Norwich*, between the years 1312, and 1386, presented vicars to *Lakenham*, but never before or after; and allowed to the vicar officiating, a stipend of 40s. a year, but never endowed the vicar of any part of the profits of the church; and to avoid endowing the vicarage, the said prior and convent, from the year 1386, to the dissolution of the priory, served the said church by a chaplain, which was usually one of their own house, removeable at pleasure; so that from 1386, to 1610, being 224 years, no vicar was instituted in the said church; the cure being constantly served by chaplains.

During such time as the priory subsisted, the prior and convent held the said manor and rectory of *Lakenham*, with all the tithes of the said parish, and frequently leased the same with the tithes thereof to tenants, who held and enjoyed accordingly.

But this priory was, in the 30th year of King *Henry VIII.* dissolved; and, by the act of the 31st of that King, for the dissolution of abbeys and monasteries, it was enacted, that all lands, tenements and tithes, should be vested in the King and his heirs, in the same state and condition, as the abbots and priors held the same; and discharged of and acquitted from the payment of tithes, as the abbots and priors held the same.

King *Henry VIII.* by letters patent, bearing date the same year, changed the said priory, and founded a Dean and Chapter in the said church; and granted to the said Dean and Chapter, the manor of *Lakenham*, and the demesne lands with the tithes thereof, and all privileges thereto belonging, or therewith held and occupied, in as large and ample manner, as the said prior and convent held the same. And accordingly the said Dean and Chapter, and their tenants, farmers and occupiers of the said lands,



lands, held and enjoyed the same, freed and discharged of all manner of tithes whatsoever.

1735.

The said Dean and Chapter being thus seised of the said manor and demesne lands, and the tithes thereof, with the rectory of *Lakenham*, by their deed under their common seal, dated the 1st of *June*, 1st *Edward VI.* surrendered the same, amongst other things, to the said King; who became seised thereof, acquitted and discharged from the payment of tithes, as the Dean and Chapter had held the same.

King *Edward VI.* by his letters patent, bearing date the 9th of *November* following, did re-found the said Dean and Chapter, and granted them several manors and lands; but reserved and excepted thereout the said manor of *Lakenham*, and the demesne lands and all the tithes thereof, as thentofore held, used, demised or leased: And by letters patent, dated the 1st of *July*, in the 7th year of his reign, granted the same to *Thomas Gresham*, Esq; by the name of the manor of *Lakenham*, and all lands, meadows, pastures, feedings, woods, tithes of corn, hay, hemp and all tithes whatsoever, in *Lakenham*, *Trowse*, and *Bracondale*, to the said manor and lands any wise belonging, or therewith used, held, or reputed. And under this *Thomas Gresham*, the appellants, *Mr. Berkley* and *Mrs. Chaplyn*, were entitled to the inheritance and freehold of the said manor, lands and tithes.

The said Dean and Chapter under the charter of the 9th of *November*, 1st *Edward VI.* being entitled to the rectory of the church of *Lakenham*, and all tithes in the said parish of *Lakenham*, (except the manor and demesne lands) served the cure at *Lakenham* by a chaplain, to whom they paid yearly a stipend, and continued so to serve the said cure till the year 1610; at which time, one *Wilkinson*, pretending that *Lakenham* was a vicarage lapsed to the crown, obtained a presentation thereto, and had institution thereon; but the rectory and the tithes there, belonging to the said Dean and Chapter, being then under a lease, made by the Dean and Chapter in the 12th year of *Queen Elizabeth*, to one *Laver* for 70 years, which did not expire till 1640, *Wilkinson* could get no tithes, so that he resigned in 1612; and in 1625, the Dean and Chapter, instead of appointing a chaplain or curate, presented one *Smith* to the church



1735.

church of *Lakenham*; and the said lease to *Laver* being in some short time after surrendered to the Dean and Chapter, they permitted the small tithes belonging to them to be taken by their new vicar, in lieu of the stipend paid by them to their curates or chaplains.

After the death of *Smith*, the Dean and Chapter presented other clerks to the said church, when vacant, as a vicarage, and permitted them to receive the small tithes belonging to the Dean and Chapter: Whence it came to be insisted upon, that the vicar of *Lakenham* was entitled to all small tithes within the said parish, as a vicarage endowed; when in fact there never was any endowment of a vicarage, otherwise than by permission of the Dean and Chapter as aforesaid; but if such permission was to be considered as an endowment by the Dean and Chapter, it could extend to no other tithes than what the Dean and Chapter were entitled to.

However, in *Easter* term, 1729, the respondent *Fox*, as vicar of *Lakenham*, preferred a bill in the Court of Exchequer against the appellants *Bardwell*, *Balls*, *Buttrice*, *Proctor* and *Rix*, as occupiers of the demesne lands of the manor of *Lakenham*, from *Michaelmas*, 1727, to *Michaelmas*, 1728, to compel payment of all manner of tithes, except corn and grain; and, amongst other things stated in his bill, it was alledged, that one *Ward*, formerly tenant of the said demesne lands, refused to pay tithes to one *Folchier*, then vicar; that in *Trinity* term, 9th *William* III. *Folchier* brought his suit in the Court of Exchequer, to compel payment of tithes: That *Ward* answered the said bill; and that in *Easter* term in the 11th of the said King, the Court directed *Ward* to pay *Folchier* the vicarial tithes for the said lands.

The appellants *Bardwell*, *Balls*, *Buttrice*, *Proctor* and *Rix*, answered the respondent *Fox*'s bill; and insisted upon the said lands being not liable to the payment of vicarial tithes to the respondent *Fox*; and set forth the exemption as before mentioned; and that the lands in their respective occupations, were let to them tithe free, and were known so to be; that the occupiers of the manor-house usually heard divine service at *Lakenham* church, and frequently gave the Minister 10s. as a free gift, or offering; who accepted the same in a thankful manner, know-  
ing



ing no tithes were due. And as to the decree obtained by *Folchier* against *Ward*, it appeared by *Ward's* answer, that he insisted that he never heard tithes were paid for the lands in his possession, for that the said lands were part of some religious house, and discharged of tithes; that the said lands belonged to Lord *Berkley*, who in *February*, 1678, leased the same to *Ward* for 14 years; and in 1691, *George Berkley*, Esq; leased the said lands to *Ward*, who then had held them 19 years, and no tithes were in all that time demanded; that the inheritance of the said lands was in Lord *Berkley* and *Jeremy Chaplyn*, Esq; in right of his wife; and that the said *Ward* being only tenant, could not answer as to the right of tithes without the aid of Lord *Berkley* and *Chaplyn*, and prayed that they might be made parties: That the said cause was brought to a hearing against *Ward* only; when the Court declared, it was a weak bill, but a worse answer; and decreed *Ward* to account for tithes: But *Folchier* afterwards resigned his vicarage, and *Ward* never paid tithes to any other vicar.

In *Trinity* term, 1731, the appellants exhibited their bill against the respondents *Fox* and the Dean and Chapter of *Norwich*; setting forth, among other things, that the respondent *Fox* had extorted several sums of money from the appellants the tenants, upon pretence of tithes; and prayed, that *Fox* might account for such sums, and that the appellants might be quieted in the enjoyment of their lands tithe free, and to establish the exemption of the said lands from the payment of tithes.

The respondent *Fox*, in his answer to this cross bill, admitted the seisin of the prior and convent as before stated; the enjoyment of the tithes by them, till their dissolution; and the leases made thereof by the prior and convent, and also by the Dean and Chapter after the dissolution. He then said, that he could not find in what year, or by what Bishop, the vicar of *Lakenham* was endowed, nor that any vicar was presented, or any institution after 1392, till the presentation of *Wilkinson*; but believed that the said prior and convent, after the statute of *Edward IV.* served the cure by a chaplain, to whom they paid a stipend; and that after the translation of the priory into a deanery, the Dean and Chapter for several years till 1610, provided



1735.

vided a chaplain, and paid him a stipend. And he admitted to have received several sums of money of the appellants the tenants, on account of tithes.

The Dean and Chapter by their answer said, that they could not find any endowment of any vicarage of *Lakenham*, or any presentation thereto, after the year 1386, till the presentation of *Wilkinson*.

On the 16th of *April*, 1733, both causes came on to be heard before the Barons of the Exchequer; when the counsel for the appellants expecting that the Court would do nothing without a trial at law, went no farther into the causes than opening the several pleadings, in order to settle a proper issue to try the exemption which was insisted on by the appellants; but the Court was pleased to deny the same: And, *without reading the depositions of any of the witnesses\**, to decree, that the appellants *Bardwell, Balls, Buttrice, Proctor and Rix*, should account for and pay the tithes demanded by the original bill, with costs; and to dismiss the cross bill with costs.

In *Hilary* term following, the appellants petitioned the Court for a rehearing, in hopes of either establishing their exemption upon evidence, or of laying a foundation for directing an issue at law, or at least of having their evidence read, in order to enable them to appeal upon the merits: But the Court thought proper to refuse a rehearing, because application was not made for that purpose within six months after pronouncing the decree, although the decree was not then passed.

J. Willes.  
N. Fazaker-  
ly.

The appellants therefore appealed; insisting, that tho' Vicars might have been anciently instituted in this church, yet no vicarage being endowed, they were not entitled to any tithes; for tithes are not due of common right to a Vicar, and in the present case, there was not the least evidence of any endowment. Neither was there any proof of the payment of tythes by the

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\* Mr. *Bunbury*, in his report of this case says, that the Dean and Chapter having said in their answer, that the vicars had been entitled to all tithes, except corn and grain, the Court thought this sufficient evidence to support the vicar's right, and decreed accordingly.



occupiers of the demesne lands, till *Ward* was forced to it by *Folcbier*, by a decree made upon a mistaken and improper defence; and in a suit, to which the owners of the inheritance were not parties, and who could not, therefore, be bound by the decree. That the title of the appellants to the exemption insisted on, depending upon old records and other written evidence, and also upon a great variety of facts, which they were ready to make out, and strongly insisted to try by a proper issue at law; the right was now, in effect, determined against them, without a hearing.

1735.

On the other side it was argued, that as the vicarage still subsisted, the abuse practised by the Prior and convent in keeping it vacant by not presenting, could not prejudice the rights of the vicarage, when the same became full. That the surrender of the Dean and Chapter to King *Edward VI.* tho' it might have vested in the Crown the manor and demesne lands, and the tithes of corn to which the Dean and Chapter were entitled as Impropriators, yet it could not affect the rights belonging to the vicarage. That the general right being with the respondent, it was incumbent on the appellants, at the hearing of the causes, to have proceeded and laid before the Court the evidence of their pretended exemption; and which, in all probability, they would have done, had they thought the same sufficient, or in any degree stronger than the evidence in the two former causes, wherein decrees had been pronounced in favour of the Vicar and his lessee. But as the appellants did not offer any evidence to this purpose, it was agreeable to the constant and known practice of the Court, to decree according to the general right, wherever persons claiming an exemption, give no evidence in support of it. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with exemplary costs.

G. Eyre.  
J. Strange.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree and order of dismissal therein complained of, should be reversed: And it was further ORDERED, that the said Court of Exchequer should proceed to hear the causes, upon the pleadings and proofs taken therein.

DECREE  
reversed,  
Jour. vol. 24.  
P. 545.



Case 28. *Thomas Hall*, Administrator of *Augustine Clarke*, deceased, Executor of } Appellant.  
*James Clarke*, deceased, - }

*Richard Digby* and *Anne* his Wife, and } Respondents.  
*Mary Lincoln*, Administratrix de bonis non of the said *James Clarke*, }

18th February, 1735.

THE said *James Clarke*, deceased, had issue six sons; *Luke*, *Augustine*, *Toby*, *James*, *John* and *Richard*; and two daughters, *Mary* and *Ann*, whom he severally provided for in his life-time, particularly *Luke*, altho' he had disobliged his father by marrying against his consent.

*Clarke*, having carried on a considerable trade as a merchant, by which he acquired a competent fortune, and being also seised of a small real estate, on the 27th of *September*, 1712, made his will; and thereby, after directing payment of his debts, and giving pecuniary and other legacies to each of his children, and without making any express disposition of the residue of his personal estate, he constituted and appointed his two eldest sons, *Luke* and *Augustine*, executors.

On the 2d of *October* following, the testator made a codicil, whereby he gave several other legacies; and on the 12th day of the same *October* he died, without otherwise altering his said will.

Amongst other of the testator's effects, *Luke* and *Augustine*, upon his death, possessed themselves of a small vessel, called the *Mary-Ann* galley, then in the harbour of *Dublin*; but no immediate opportunity presenting itself for the sale thereof, they thought proper, in the mean time, for the improvement of the testator's assets, and for the benefit of all parties interested therein, to let her out to freight; and accordingly accepted of an offer made to them for that purpose by *Mr. Lynch*, a merchant, who hired her on a voyage to *Bordeaux* in *France*,  
 with



with directions, that the money to arise out of such freight might be there invested in the purchase of some casks of brandy, which were to be brought to *Dublin* by the said ship, on her return homeward, in order to be sold and carried to the credit of the testator's estate.

1735.

Soon afterwards, the executors, in order to settle the accounts of the testator in his trade, wrote circular letters to his several correspondents both at home and abroad, to call in their respective accounts; but declined proving the will, till they should first know the exact state of his affairs, and thereby determine, with some certainty, how far his estate would exceed, or fall short of the whole amount of his debts and legacies.

But before that could be ascertained, and before the return of the said vessel to *Dublin*, *Luke Clarke* died in *June*, 1713, possessed of a considerable personal estate, leaving *Barbara* his wife, and *Adam* his only son and heir, and the respondent *Ann* his daughter; having first made his will, and thereby, without taking notice of any claim to the residue of the testator *James Clarke's* personal estate, he bequeathed to the respondent *Ann* 600*l.* for her portion, payable at her day of marriage, with interest until payment; and of his will appointed the said *Barbara* his wife sole executrix, who afterwards proved the same, and possessed herself not only of all the said *Luke Clarke's* own personal estate, but also of such part of the assets of the said *James Clarke*, as came to the hands of *Luke*, and had not been applied by him towards the discharge of the testator *James's* debts and legacies.

After the decease of *Luke Clarke*, the appellant *Augustine* solely proved the will of the testator *James*, his father, and proceeded to get into his hands the testator's assets, and to apply the same in discharge of his debts and legacies.

The respondent *Ann* having in 1726, intermarried with the respondent *Richard Digby*, they in 1728, exhibited their bill in the Court of Exchequer in *Ireland*, against the said *Augustine Clarke* and others; praying, that a moiety of the residue of the testator *James Clarke's* personal estate, after payment of his debts and legacies, might be considered as the right and property of the said *Luke Clarke*, and be decreed to be a fund in the hands of



1735.

the said *Augustine*, for payment and satisfaction of the 600*l.* legacy, bequeathed to the respondent *Ann* by the said *Luke* her father; and for this purpose, the respondents suggested an agreement entered into between *Luke* and *Augustine*, for an equal division of the residue of *James Clarke*'s estate; and insisted, that tho' there had not been any such agreement, yet that a moiety of such residue ought, by the custom of merchants, to have survived to the representatives of *Luke Clarke*; in regard he and *Augustine* had traded together with part of the assets, by letting out the said sloop to freight, in the manner already mentioned; and in that respect, should be considered as merchants trading in partnership.

To this bill *Augustine* put in a full answer, and thereby denied the pretended agreement between him and *Luke*, or that there ever was any sort of partnership between them, or that they ever traded with any part of the assets, otherwise than as aforesaid; and therefore, as to that part of the bill which sought a discovery of the testator's assets, *Augustine*, instead of entering into a particular account thereof, admitted sufficient in his hands to answer any just demands which the respondents had on the testator's estate.

The cause being at issue, several witnesses were examined on both sides, and publication having been duly passed, the same came on to be heard before the Barons of the said Court of Exchequer, on the 26th of *November*, 1733, and was further heard on the 3d and 5th of *December* following, and on the 23d of *February*, 1733; when the Court were pleased to decree, that the respondents *Richard Digby* and *Ann* his wife, should have and recover the 600*l.* legacy, with interest for the same from the death of the said *Luke Clarke*, to be paid out of the assets of the said *James Clarke*, the grandfather, but without costs.

N. Fazaker-  
ly.  
W. Hamil-  
ton.

From this decree *Augustine* appealed; and soon afterwards dying intestate, the appellant, as his administrator, revived the appeal. In support of which it was argued, that *Luke* and *Augustine Clarke*, being joint executors, were jointly interested, and that *Luke* dying in the life-time of *Augustine*, the whole survived to him; and the rather, as *Luke* never proved the  
testator's



## Cases in Parliament.

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testator's will. That nothing appeared to have been done, which could amount to a separation of their interests; for tho' it had been attempted to make them in the nature of partners in trade, yet there was no evidence to support it: The only colour of proof was, the instance of letting the *Ann* galley to freight, but this it was apprehended could not amount to a severance of the joint interest; and if by possibility it could be deemed such a severance as would prevent a survivorship, yet it extended to no other part of the testator's personal estate: And therefore it was hoped, that the decree would be reversed.

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On the other side it was contended, that *Luke* and *Augustine* became entitled, not by virtue of any express gift of the residue, but from the apparent intention of the testator, in making them joint executors; and therefore there was nothing to make them joint tenants of the residue, so as to entitle the survivor to the whole. That amongst merchants and joint traders, the law of survivorship does not prevail, and their carrying on a trade together with the testator's estate, was putting it upon the foot of a partnership, and was, in effect, an actual receipt of each of their shares. The decree therefore was right, and ought to be affirmed.

D. Ryder.  
J. Strange.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed; and that the bill exhibited in the Court of Exchequer, by the respondents *Digby* and his wife, should be dismissed.

DECREE  
reversed,  
Jour. vol. 24.  
p. 592.

*Andrew*



Case 29. *Andrew Wither*, Esq; surviving Executor of *Charles Wither*, Esq; the Father, deceased; *Frances Wither*, Widow and Executrix of *Charles Wither*, Esq; the Son, deceased; *Dorothy Wither*, Spinster, *Henrietta Maria Wither* and *Ann Wither*, Infants, the three Daughters and Coheirs at Law of the said *Charles Wither*, the Son, } Appellants.

*William King*, L. L. D. Administrator of his late Wife *Henrietta Maria*, only Daughter of the said *Charles Wither*, the Father, } Respondent.

15th March, 1735.

3 Wms. 414.  
Forrester 117.  
Gilbert's  
Rep. 26.  
Precedents in  
Chan. 348.  
Viner, vol. 4.  
p. 200. ca. 11.  
vol. 16. p. 449.  
ca. 12.  
1 Eq. ab. 112.  
ca. 10.  
2 Eq. ab. 656.  
ca. 10.  
Ferne's  
Contingent  
Remainders,  
p. 445.

**C**HARLES *Wither*, the father, having issue by *Dorothy* his wife one son, named *Charles*, and one daughter, *Henrietta Maria*, the wife of the respondent Dr. *King*; and being seised of a real estate of 1000*l.* per ann. and possessed of a considerable personal estate, and intending to provide a portion for his daughter, and likewise to make an additional provision for her, in case his son should die without issue male living at his death; did, by his will, dated the 3d of June, 1697, *inter alia*, give and bequeath unto his daughter *Henrietta Maria*, at her age of 21, or day of marriage, which should first happen, 2500*l.* And declared his will to be, that if his said son *Charles* should die without issue male of his body then living, or which might afterwards be born, that then his said daughter should have and receive at her age of 21, or day of marriage, which should first happen, the sum of 3500*l.* over and above the before mentioned sum of 2500*l.*; and in case the contingency of his said son's dying without issue male should not happen before his said daughter's age of 21, or her day of marriage, that then she should receive and be paid the said sum of 3500*l.* whenever it might after happen. And the testator appointed his

said



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saïd wife *Dorothy*, the appellant *Andrew Wither* his brother, and *John White*, Esq; his uncle, his executors. — The testator then devised all his lands and tenements in the county of *Southampton* and elsewhere, (except his freehold lands and tenements in the parish and tithing of *Kingsclere* in the saïd county) to his saïd son *Charles*, and the heirs of his body; remainder to the appellant *Andrew Wither*, and his heirs; and directed, that whilst his saïd son should be under age, his executors should receive the profits of his saïd estate, towards the performance of his will. He also declared, that the lands and premises immediately before devised, should be liable to, and chargeable with, the payment of the saïd 3500*l.* thereby willed to his saïd daughter, whenever it might become due and payable. — And to the intent that all his debts, legacies and funeral expences might be justly paid, and his will punctually performed, he devised all his saïd several freehold farms, and all his lands and tenements in *Kingsclere*, to the saïd *Dorothy* his wife, and the appellant *Andrew Wither*, and to the saïd *John White*, and their heirs, upon trust, to employ the yearly profits thereof towards satisfying his debts and performance of his will; and thereby empowered his executors, as they should see occasion, to mortgage or sell all or any part of his lands and premises in *Kingsclere*, for the more speedy execution of his saïd will; but that such part thereof as should not be disposed of, should, after the fulfilling of his will, be to the use of his saïd son *Charles* and the heirs of his body; and for default of such issue, to his brother the appellant *Andrew*, and his heirs for ever. And the testator by his saïd will, authorised his executors to cut down and fell any of the timber trees growing on any of his lands in the county of *Southampton*, or elsewhere; (except such trees as should be an ornament or defence to his capital messuage of *Hall*, or any other of his messuages or houses) and declared, that whereas it was his intent and meaning, that upon default of heirs of the body of his saïd son *Charles*, his saïd brother, the appellant *Andrew Wither*, should inherit and enjoy all his copyhold messuages and lands in the tithing of *Itchenwell*, in the saïd parish of *Kingsclere*, or elsewhere, and all his other lands and premises wherein or to which he had, or might have at his death, any right, title, or interest, either in law or equity; if therefore, his saïd daughter *Henrietta*



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*Maria*, her heirs or assigns, should not at the proper costs and charges of the appellant *Andrew Wither*, surrender the said copyhold lands and premises to the use of the said *Andrew Wither* and his heirs; and make such other conveyances in the law, which the appellant *Andrew Wither* should be advised to, for the better securing and settling of the said copyhold, and other the said lands and premises, according to the true intent and meaning of such his will; that then the said legacy of 3500*l.* should determine and be void. And he gave the residue of his personal estate, after payment of his debts and legacies, to his said son *Charles*.

Soon after making this will the testator died, leaving the said *Dorothy* his wife, the said *Charles* his only son, and the said *Henrietta Maria* his only daughter; whereupon all the executors proved the will, and possessed themselves of the testator's personal estate, and entered upon all the real estate, and received the rents and profits thereof, and continued so to do, till *Charles Wither* the son attained his age of 21; and applied the said rents and profits towards payment of the testator's debts and legacies.

*John White*, one of the executors, afterwards died; whereby the executorship and trust estate survived to the said *Dorothy* and the appellant *Andrew Wither*.

The said *Charles Wither*, the son, intermarried with the appellant *Frances*, and the respondent *Dr. King* with the said *Henrietta Maria*, the testator's daughter, after she had attained her age of 21; who afterwards, and in the life-time of her brother, died; leaving issue by the respondent *Dr. King*, several sons and daughters.

On the 20th of *November*, 1731, the said *Charles Wither* the son died; leaving the appellant *Frances* his widow, and the appellants *Dorothy*, *Henrietta Maria*, and *Ann*, his three daughters and coheirs at law; but without leaving any issue male of his body living at his death, or in *ventre sa mere*. Before his death he made his will, and thereof appointed his wife, the appellant *Frances*, sole executrix, who proved the same, and possessed his personal estate.

*Charles*



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*Charles Wither* the son being dead, without leaving any issue male of his body living at his death, and dying seised and possessed of a considerable real and personal estate; the respondent *Dr. King*, on the 17th of *April*, 1732, took out letters of administration to his late wife; and thereby became entitled to the additional portion or legacy of 3500*l.* payable upon her said brother's dying without issue male living at his death. But the appellants refusing to pay the same, the respondent, in *Easter* term, 1732, filed his bill in the Court of Chancery, against the appellants; insisting, that the said contingency having happened, he was entitled to the said 3500*l.* with interest from the death of the said *Charles* the son; and that not only the said *Charles Wither* the father's personal estate, but also his real estate was charged with the payment thereof: But in case the Court should be of opinion, that the real estate of *Charles Wither* the father, ought not to be chargeable with the payment of the same, by reason of the respondent's wife dying before the contingency happened; yet he insisted, that the personal estate must in all events be liable to such payment, and that if the same, or any part thereof, had been exhausted in payment of debts, he would be entitled, by the rules of the Court, to stand in the place of such creditors whose debts had been so paid; and to have a satisfaction out of the said *Charles Wither* the father's real estate, by his will subjected to the payment of his debts, so far as such debts had been paid out of such personal estate; so that every way the real estate of the said *Charles Wither* the father, was and ought to be liable to the raising and paying the said 3500*l.* and interest, to the respondent. The respondent therefore by his said bill prayed, that he might be paid the said additional portion or legacy of 3500*l.* so given to his said late wife, with interest; and that an account might be taken of the personal estate of the testator *Charles Wither* the father, and of the rents and profits of his real estate, and of the value of the timber felled therefrom; and also an account of the personal estate of *Charles Wither* the son; and that the respondent might receive a satisfaction for the said 3500*l.* and the interest thereof, from the death of the said *Charles Wither* the son, either out of his personal, or real estate.

The



1735.

The appellants, by their several answers to this bill, insisted, that the respondent was not entitled to the said legacy, in regard his wife died in the life-time of *Charles Wither* the son: And that it was the testator's intention, appearing from the words of his will, that such increase of portion should be paid to his said daughter, upon the death of *Charles Wither* the son, without issue male, if she should be then living, and not otherwise; inasmuch as the testator, by his said will, did not direct the same to be paid to her executors or administrators: And also in regard that *Charles Wither*, the father, did not leave personal assets sufficient to pay the same; so that such increase of portion, if to be raised at all, was to be raised out of his real estate, by his said will particularly charged therewith.

On the 11th of *July*, 1735, the cause was heard before the Lord Chancellor *Talbot*; who declared, that the will of the testator *Charles Wither* the father, was well proved, and was of opinion, that the sum of 3500*l.* was a subsisting charge on the said testator's real estate; and decreed, that it should be referred to a Master, to take an account of what was due to the respondent for the said principal sum of 3500*l.* with interest for the same at the rate of 4*l. per cent. per ann.* from the death of *Charles Wither* the son; and that the Master should likewise take an account of the personal estate of the said testator *Charles Wither*, and of the rents and profits of his real estate, which were devised by his said will, and became due during the minority of the said *Charles Wither* the son; and of the money raised by sale of timber from off the said estates, which were received by the executors of the said *Charles Wither* the father, or by the said *Charles Wither* the son respectively, or by their respective representatives; and in taking those accounts, the Master was not to unravel the accounts which had been stated between the executors of the said *Charles Wither* the father, and *Charles Wither* the son; and what, if any thing, upon taking the said accounts, should appear to have been so received more than sufficient to pay the testator's debts and funeral expences, and the other legacies given by his will, was to be applied towards satisfaction of what should be found due to the respondent, for the said sum of 3500*l.* and interest; and in case the money before directed to be applied for payment of the said 3500*l.* and interest, should not be sufficient to pay the same, then



then it was further ordered, that the Master should enquire what real estate the testator *Charles Wither* the father died seised of, in fee simple in possession, or reversion, and whether such reversion had been barred or not; and as to such estates whereof he died seised in fee simple in possession, or in reversion, whereof the reversion had not been barred, the Master was to see such convenient part thereof sold, or mortgaged, as would be sufficient to raise the deficiency, and the monies arising by such sale, or mortgage, were to be applied accordingly; in which sale or mortgage all proper parties were to join, as the Master should direct: And the Master was to tax all parties their costs of suit, which were to be paid to them out of the said testator's estate.

1735.

From this decree the appellants appealed; and on their behalf it was argued, that the additional portion of 3500*l.* being given to *Henrietta Maria*, the respondent's late wife, upon the contingencies of *Charles Wither* the son's dying without issue male, and of her marrying, or attaining 21; both those contingencies ought to have happened in her life-time, before such additional portion could vest in her, so as to be transmissible as a charge on the real estate, to her administrator; and as both these contingencies did not happen in her life-time, the additional portion ought not, in favour of the respondent as her administrator, to be raised out of the real estate, to the prejudice of the appellants, the coheirs at law; but ought to sink into the inheritance, agreeable to those determinations in Courts of Equity, where portions having been given to younger children, payable out of lands at a future time, before which time such children have died, such portions have not been held to have vested, and ought not to be raised for the benefit of the executors or administrators of such children, but to sink for the benefit of the heirs, or remainder-men. That in the present case, the additional portion not being given or made payable by the will, to the executors or administrators of *Henrietta*, shewed clearly the testator's intention that it should not be paid out of his real estate (which he had entailed in his family) to a stranger, who had before received a portion of 2500*l.* with her, but had made no additional settlement in prospect of this 3500*l.* nor could be obliged to make any distribution thereof among the children of *Henrietta*, in case the same should be paid to him.—

D. Ryder.  
N. Fazaker-  
ly.





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— As to the objection, that *Henrietta* had a contingent interest, or a possibility vested in her with regard to this additional portion of 3500*l.* though she died before both the contingencies actually happened, and that contingent as well as vested interests are transmissible to representatives: It was answered, that there is no instance, where an executor or administrator has had any advantage against an heir at law, to charge his estate upon such a contingent interest, or possibility; tho' there may have been cases, in which an executor or administrator has had the benefit of such a contingent interest or possibility, against an executor or administrator; and that many cases have been determined upon that precise distinction between a contingent charge on a real, and on a personal estate. It was therefore hoped, that the decree would be reversed.

J. Willes.

J. Strange.

On the other side it was said, that the single question seemed to be, Whether as *Henrietta* died in the life-time of her brother *Charles*, the additional portion or legacy of 3500*l.* given her on the contingency of his dying without issue male living at the time of his death, belonged to her representative, or became a lapsed legacy by her dying before her brother? As to which, it was insisted to be plain upon the face of the testator's will, that his intention was to make a provision for his daughter, not only by giving her a portion of 2500*l.* payable at 21, or marriage, but likewise the additional portion or legacy of 3500*l.* payable on the contingency of her brother *Charles*'s dying without issue male then living. That *Henrietta*'s dying in her brother's life-time, was not any objection against the respondent's right to this additional legacy, because it was expressly directed by the will, that though the contingency should not happen before her attaining 21, or before her marriage, yet the said additional portion or legacy of 3500*l.* should be paid *whenever the said contingency should afterwards happen*; without annexing any restriction thereto of the daughter's being then alive. And in another part of his will, the testator expressly declared his meaning to be, that the lands and premises thereby devised to his son *Charles*, with remainder in fee to his brother *Andrew*, should be liable to and chargeable with the payment of the said 3500*l.* whenever it might happen to become due and payable; which shewed the strongest intention in the testator, that this 3500*l.* should be a charge on his real estate, upon the death of his son *Charles* without issue male, whenever that contingency should happen,



happen, whether his daughter was then living, or not. That the several parts of the testator's will being thus taken and considered together, it was hardly possible for him to have expressed himself in clearer or stronger words, to prevent any doubt concerning the respondent's right to this legacy; which being in it's nature one of the considerations for *Henrietta's* advancement in marriage, the respondent conceived himself to be clearly entitled thereto, as her husband and administrator. And therefore hoped, that the decree would be affirmed.

1735.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed. Jour. vol. 24. p. 611.

The Honourable *Henry Berkley, Esq;*  
*Jane Chaplyn, Widow, Robert Lack-*  
*ford, Mary Bardwell, James Balls,* } Appellants.  
*Thomas Buttrice, Frances Proctor,*  
*and William Rix, - - -*

Case 30.

*John Fox, Clerk, and the Dean and* } Respondents.  
*Chapter of Norwich, - - -*

18th March, 1735.

IN pursuance of the order made on the former appeal \*, these causes were on the 6th of *November, 1735*, heard upon the pleadings and proofs; when the Court again decreed, that the appellants, the tenants, should account for and pay the tithes, as demanded by the original bill, with costs; and dismissed the cross bill, with costs.

\* Vide ante, p. 216.

Comyn's Rep. 498. Viner, vol. 9. p. 57. ca. 12.

The appellants, therefore, appealed a second time from this decree, stating the same case as before; and insisting, that having given full evidence of the exemption, there was a sufficient foundation for the Court, either to establish the same, or at least to direct an issue for trying it. That by this decree, the appellants were to account for the tithes of all the lands in their

J. Willes. N. Fazakerly.



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their respective occupations; whereas it was plainly proved, that 60 acres, part of the lands in the occupation of the appellant *Bardwell*, were part of the manors, and lay in the several parishes of *Eaton* and *Amringhall*, which had never paid any vicarial tithes, or any composition for the same; and that about 24 acres, other part of the said farm, lay in the parish of *Saint Stephen*, in the county of the city of *Norwich*; and there was no proof, that the respondent was entitled to any portion of tithes out of lands, not within the parish of *Lakenham*. That the appellants were to account for the tithes of hay, altho' the respondent had made no manner of proof of any title to such tithes, or that the same had ever been taken by the Vicar; besides, the tithe of hay is a great tithe, and not vicarial, and upon hearing the cause of *Folchier v. Ward*, whereon the respondent in a great measure founded his demand of any tithes whatsoever, the then defendant was not to account for the tithes of hay, but, by the minutes taken on the hearing of that cause, those tithes were expressly excepted.

D. Ryder.

W. Bunbury.

The respondent likewise stated the same case as before, and in addition to the reasons there given, it was now said to have appeared upon full proof at the last hearing, and also by the proofs in the former cause of *Folchier v. Ward*, that valuable compositions for the vicarial tithes of *Hall* farm, were peaceably paid to the Vicar of the parish, by the tenants under Lord *Berkely* for many years together. And tho' disputes were afterwards raised about the said tithes, yet the same had been adjudged to the Vicar and his lessee by the former decrees.

DECREE  
affirmed.  
Jour. vol. 24.  
p. 615.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed: And it was further ORDERED, that the appellants should pay to the respondent *John Fox* 200*l.* for his costs, in respect of the said appeal.



*Gervas Scrope*, Esq; and *Ann* his Wife,  
the Executrix and second Wife of } Appellants. Case 31.  
*Stephen Offley*, Esq; deceased, - }

*Joseph Offley*, Esq; eldest Son and Heir  
of the said *Stephen*, by *Urith* his first } Respondent.  
Wife, - - - - }

25th March, 1736.

**CORNELIUS** *Clarke*, Esq; being seised in fee of several manors and lands in *Norton* and elsewhere in *Derbyshire*, of about 800*l.* a year; by his will, dated the 1st of *June*, 1694, devised the same to his nephew *Robert Offley*, the respondent's grandfather for life; remainder to *Robert*, his eldest son, for life, and to his first and other sons in tail male; remainder to *Stephen*, his second son, the respondent's father for life, remainder to his first and other sons in tail male; remainder to the third and other sons of the said *Robert Offley*, the nephew, in tail male; remainder to the testator's right heirs: With power for the said *Robert Offley*, the younger, and *Stephen*, as the premisses should respectively come to them, by writing under their hands and seals, to appoint any part thereof, not exceeding a moiety, as a jointure for any wife for her life.

Grounds and  
Rudiments of  
Law and E-  
quity, p. 19.  
ca. 18.  
2 Eq. ab. 54.  
ca. 14.

The testator died, without revoking or altering his will, and soon afterwards *Robert Offley*, the son, died without issue.

*Robert*, the nephew, being in possession, a treaty of marriage was proposed between the said *Stephen* (then his eldest son) and *Urith*, the respondent's late mother, one of the four daughters and coheirs of *Samuel Smith*, Esq; whose fortune was 8000*l.* whereof about 300*l.* a year was in land: And in consequence of this treaty, by indenture tripartite of the 17th of *May*, 1700, between the said *Robert* and *Stephen Offley* of the first part, *William Manning*, guardian of the said *Urith*, of the second part, and the said *Urith* of the third part; in consideration of the intended marriage, and of the said *Urith*'s fortune,



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it was agreed, that her real estate, when she came of age, should be conveyed to the said *Stephen Offley* and his heirs, subject to such charges, and upon such conditions, as therein mentioned. And the said *Robert Offley*, in consideration thereof, and of the marriage, covenanted for himself and his heirs with *Manning*; that he would, within one year after the marriage, secure to *Stephen* and *Urith* 250*l.* a year for their maintenance, during the said *Robert's* life; and also settle upon them, for their lives, one moiety of *Cornelius Clarke's* estate of near 400*l.* a year, to take effect upon his death, which moiety should be in full of *Urith's* dower; and that the same should be settled on all the sons of *Stephen* and *Urith* successively in tail male. And it was agreed between all the parties, that the other moiety of *Clarke's* estate should also be settled, after the death of *Robert Offley* and of *Clarke's* widow, upon the said *Stephen* for life, and to his several sons in tail male successively. And that in such conveyances, there should be trustees to preserve remainders, as counsel should advise; and a power, as should be likewise advised, for raising 4000*l.* out of *Urith's* real estate, for the younger childrens portions, and for raising 200*l.* yearly for their maintenance in the mean time. Provided, that if *Urith*, when of age, should refuse to convey her real estate to *Stephen* and his heirs, (subject to the charges aforesaid) then the limitations to her for her jointure should cease. And it was further agreed, that all such other clauses, provisoes and agreements, as counsel should reasonably advise, should be inserted in such conveyance, to be made as aforesaid, as are usual in marriage settlements; and which should be conducing to the settlement of the said estates, according to the true intent and meaning of the said indenture.

This deed was executed by all the parties, and soon afterwards the marriage took effect.

By indentures of lease and release, dated the 16th and 17th of *May*, 1701, the said *Robert* and *Stephen Offley*, in consideration of the marriage then had, and expressly declaring it to be in performance of the said marriage agreement; did jointly convey to *Manning* and one *Samuel Crome*, and their heirs, all the said *Cornelius Clarke's* estate, and all the right, title, interest, use, property, claim and demand of them, or either of them,

of,



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of, in, or to the same, to the use (as to part) of *Stephen* for life; then to *Urith* for life; then to *Robert*, their new born son, and the heirs male of his body; with remainder to the second and other sons of the said *Stephen* and *Urith* in tail male; as to other part, to the use of *Robert*, the grandfather, for life; then to *Stephen* for life; then to *Urith* for life, in full of her jointure; with the like remainder to *Robert*, their infant son, in tail male, and to their second and other sons in tail male successively: And as to the residue, to *Robert*, the grandfather, for life, then to *Stephen* for life; remainder to *Robert*, the infant son, in tail male; remainder to the second and other sons of *Stephen* and *Urith*, in tail male successively. Provided, that if *Urith*, when she came of age, should refuse to convey her real estate to *Stephen* and his heirs, subject to such charges, and upon such conditions, as were mentioned in the said marriage agreement, then the limitations to her for life should be void. And the said *Robert* and *Stephen Offley* covenanted, that they, or one of them, had full power to settle the premises as aforesaid, and that the same should remain and continue to and for the uses and trusts aforesaid, freed from all acts, estates, titles, charges and incumbrances, made, committed or done, or then after to be made, committed or done by them, or either of them.

No notice was taken, either in the said marriage agreement, or in the settlement made pursuant to it, of the said *Cornelius Clarke's* will; or the power therein contained, for making a jointure; or that *Robert*, the grandfather, and *Stephen* were only tenants for life of the said estate; but they agreed to convey and settle the same, as if they or one of them had been seised thereof in fee simple, and covenanted for enjoyment accordingly.

By indenture, dated the 4th of *May*, 1704, and by fine, the said *Stephen* and *Urith* (she being of age) settled all her real estate to the use of *Stephen* and his heirs.

*Robert*, the first son of *Stephen* and *Urith*, died before *Urith*; and in 1711, she died, leaving the respondent, her then eldest son, and *Stephen*, her only younger child living.

In



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In 1712, the said *Stephen*, the respondent's father, married the appellant *Ann*, whose fortune was about 1200*l.* but of which he had no more than 200*l.* to his own use.

In 1716, *Robert Offley*, the father of *Stephen*, died; and by lease and release, dated the 13th and 14th of *January*, 1717, the said *Stephen* settled an estate of 40*l.* a year of his own purchasing, and also 65*l.* a year, part of the said *Uritb's* estate, and 9*l.* 10*s.* a year leasehold estate for 600 years, and also 1000*l.* of the appellant *Ann's* fortune, in trust for himself and her for life, then to all her children by him in equal shares: And by another deed, dated the same 14th of *January*, he limited to the appellant *Ann* about 300*l.* a year of *Cornelius Clarke's* estate as a jointure.

By deed, dated the 4th of *September*, 1721, *Stephen* confirmed the appellant *Ann's* jointure, and added thereto as much more of the said *Clarke's* estate, as made the whole about 371*l.* a year, which was not quite a moiety of it.

The respondent came of age in *December*, 1723, and soon after was sent for home from his studies, being then, and at the time of his joining in the deeds and recovery after mentioned, entirely ignorant of the said *Uritb* his mother's marriage agreement and settlement, and all the other deeds and writings above stated, and of what provision his father had made, or could make, for the appellant *Ann*, or her children; and his father having then four daughters by her, he and the appellant *Ann* solicited and importuned the respondent, to charge 3000*l.* on *Cornelius Clarke's* estate, for portions for those daughters; alledging, that his father had nothing else to give them; and proposing, if the respondent would consent, that his father would at present allow him 260*l.* a year for his maintenance, and at his death leave him the furniture of the capital house; but threatening, if he refused, to keep him at home, and allow him nothing. Under these circumstances, the respondent was drawn in to execute certain deeds, which were prepared by his father's directions, and bore date the 15th and 16th of *June*, 1724, and afterwards to join in a recovery; but the respondent was not allowed to advise upon the deeds, and was assured and depended upon it, that they were for no other purpose than as  
afore said,



aforesaid, there being nothing more proposed, or asked of him. But he afterwards found, that he and his brother *Stephen* were thereby made only tenants for life successively of *Clarke's* estate, with remainder, in strict entail, to their respective issue male; remainder to *Stephen*, the respondent's father and his heirs; and that a proviso was thrown in at the end of the deed, that nothing should in any wise impeach or make void the jointure theretofore made by *Stephen*, the father, to the appellant *Ann* for life, in case she should happen to survive him, by virtue of a power given him by *Clarke's* will.

1736.

*Stephen*, the father, by deeds dated the 14th and 15th of July, 1725, confirmed the deeds of the 13th and 14th of January, 1717.

The said *Stephen*, by his will, dated the 3d of August, 1726, devised all the said *Uritb's* copyhold lands, and a close called *Bullock Stortb*, and a house called *Chantry*, to the appellant *Ann* and her four daughters; and gave the said *Cornelius Clarke's* whole estate, in case of failure of issue male of the respondent and his brother *Stephen*, to the said four daughters, and the heirs of their bodies; and he also gave them all his personal estate, amounting to 4000*l.* and made the appellant *Ann* his executrix; and on the 1st of October, 1727, he died. Soon after which, the appellant *Ann* brought an ejectment for the lands limited to her in jointure, and obtained a verdict.

The respondent, some time after his father's death (and not before) discovered, and got into his hands his said mother's marriage agreement and settlement; and then finding what large provisions had been made for the appellant *Ann* and her daughters, he was advised, and on the 20th of February, 1727, did bring his bill in Chancery against the appellant *Ann* and her daughters, for a specific performance of his mother's marriage agreement, and to restrain the appellant *Ann* from proceeding at law on the ejectment she had brought for her pretended jointure; and that he might be quieted in the possession of all *Cornelius Clarke's* estate, and for a discovery of his father's real and personal estates, and that the indenture of the 16th of June, 1724, might be set aside, as having been unfairly obtained.



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The appellant *Ann* (while a widow) for herself, and as guardian for her said daughters, put in an answer; and after her marriage, she and the appellant *Gervas* put in another answer, and thereby insisted on all the said deeds and provisions made for her and her children; and said, that on her marriage, the said *Stephen Offley* told her, he could not, in his father's life-time, provide for her and their children in the manner he intended; but verbally promised, that on his father's death, when the whole of *Clarke's* estate would come to him, he would make her a handsome estate, and sufficiently provide for her children.

On the 24th of *February*, 1730, this cause was heard before the Lord Chancellor *King*; when his Lordship declared, that the respondent, by virtue of the said marriage agreement, and of the said settlement made pursuant to it, was entitled to hold the said *Clarke's* estate, discharged of the jointure claimed thereout by the appellant *Ann*, and decreed accordingly, and that the injunction should be perpetual; and as to the rest of the respondent's bill, his Lordship thought fit to dismiss the same.

J. Willes.

N. Fazaker-  
ly.

From this decree the appellants appealed; and to obviate the principal objection, that tho' this was a good appointment of a jointure, in pursuance of a power subsisting at law, yet the execution of that power being contrary to the covenants contained in the articles and settlement made in pursuance thereof, it ought not to have been executed, to the prejudice of the uses therein contained; it was said, that in the articles of 1700, *Robert Offley* the father only covenanted, and not *Stephen* the son, who had the power of appointing the jointure, and therefore *Stephen* the son was not bound thereby; but satisfaction, if any, ought to be made to the respondent out of the assets of *Robert* the father. That the settlement of *May*, 1701, was made after marriage; and not being made in pursuance of any covenant entered into by *Stephen* the son, was, as to him, a voluntary conveyance. That at the time of executing it, *Stephen* the son was not actually seised of *Cornelius Clarke's* estate, his father *Robert* being tenant for life, and then living; and the words of the proviso were, *from and after such time, as the same shall so descend*, he shall have power to declare, limit



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limit and appoint, &c. That supposing the appointment to *Uritb* to be good, yet *Stephen* had power, after her death, to limit the same moiety, or the other moiety to any other wife; the words of the proviso being *for any wife or wives*, &c. This being so, there was nothing to hinder *Stephen* from appointing a jointure to the appellant *Ann*, but the covenant in the deed of 1701, "that the premises should remain and continue to the uses aforesaid, acquitted and discharged, or otherwise saved harmless from all former and other estates, titles, charges and incumbrances whatsoever, had made, done, or suffered, or to be had, made, done, or suffered by them, or their heirs." Now the words *to be had*, which are the only words insisted on by the respondent, are the common words used in all covenants against incumbrances, and are put in as words of course by the drawer of the conveyance, without any special direction from the parties. And it was apprehended, that the execution of a collateral power could never be meant by those general words, but only mortgages, judgments, or other incumbrances, directly charging the estate; and the rather, because there did not appear to be any notice taken in the conveyance, of *Stephen's* power of limiting a jointure to any number of wives one after another; and if it was the intention of the parties to bar that power, they would have inserted a special covenant against it. Nor was it easily to be presumed, that *Stephen* would, upon his marriage with one wife, put himself out of the capacity of marrying another in case of her death. It was therefore hoped, that the decree would be reversed.

On the other side it was contended, that the appellant *Ann's* pretended jointure was merely voluntary; made long after her marriage, not pursuant to any articles before marriage, and made by *Stephen* in breach and fraud of his express covenant, which was well known and disclosed to the appellant *Ann* at the time. Besides, it was plain that she did not rely upon that provision; for on the very same day it was executed, other deeds were also executed for settling 1000*l.* of her own fortune, and all *Stephen's* own real estate, and also all that remained unfold by him of *Uritb's* real estate, being altogether about 120*l.* *per ann.* upon herself, for life, and afterwards upon her daughters. That the respondent was a purchaser for a valuable consideration, under his mother's marriage agreement and settlement; the



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the plain import whereof, and of his father and grandfather's covenants for enjoyment was, that no estate should be created, or intervene between the death of the respondent's father and mother, and his enjoying *Cornelius Clarke's* estate. And therefore, and under the circumstances of threats, imposition and concealment before stated, the respondent ought not to be prejudiced by the deeds and recovery which he had been so drawn in to execute; and especially, as the pretended jointure was not thereby ratified or confirmed.

DECREE  
affirmed,  
Jour. vol. 24.  
p. 626.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 32.

*Nathaniel Wilkins Brett,* - - Appellant.

*Jacob Sawbridge, Esq; William New-*  
*land, Peter Delamotte, Esq; George* } Respondents.  
*Thompson, and John White,* -

30th March, 1736.

Grounds and  
Rudiments of  
Law and E-  
quity, p. 265.  
ca. 21.

**J**OHN Wroth, Esq, afterwards Sir John Wroth, Bart. being seised in fee of a messuage called *Blendon-Hall*, and of other messuages and lands in the county of *Kent*; by indenture, dated the 16th of *February*, 1657, demised the same to *Francis Hill*, for 1000 years. And the said *Francis Hill*, on the 18th of *December*, 1660, executed a defeazance, wherein reciting the said demise, he declared, that the same was made for securing 1100*l.* and interest at 6*l.* per cent.; and that on payment thereof, and of 400*l.* more, then borrowed, and interest for the same, making together 1590*l.* the demise should be void. And by another indenture, dated the 20th of *December*, 1662, in consideration of 1500*l.* paid to the said *Francis Hill* by Sir John Baber, and of 200*l.* to Sir John Wroth, the said *Francis Hill* and Sir John Wroth assigned the premises to Sir John Baber, for the remainder of the 1000 years, redeemable on payment by Sir John Wroth of 1802*l.*



By indenture, dated the 23d of *December*, 1669, Sir *John Wroth* confirmed the premises to Sir *John Baber*, for the remainder of the said term, redeemable on payment of 2472*l.* thereby acknowledged to be due.

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Sir *John Wroth* died in 1671; whereby the reversion of the premises, subject to the said mortgage, descended to Sir *John Wroth*, his son and heir.

By indenture, dated the 11th of *January*, 1672, Sir *John Baber*, in consideration of 2400*l.* paid by *Edward Brewster*, assigned the premises for the residue of the said term to *Brewster*, who took possession of the same: And afterwards the said *Edward Brewster*, by indenture, dated the 14th of *October*, 1673, for the considerations therein mentioned, assigned the premises to *Richard Watson*, his executors and administrators: And *Brewster* thereby covenanted, that Sir *John Baber*, and one *Ralph Marshall* and *Brewster* himself, and all persons claiming under Sir *John Wroth*, would do any act within seven years, for further assuring the premises to the said *Richard Watson*, his executors and administrators, for the residue of the said 1000 years: And it was thereby declared, that the said assignment to *Watson* was made in trust for Sir *Edward Brett*, to the intent to wait upon the inheritance of the premises, intended to be conveyed to the said Sir *Edward Brett* and his heirs.

After this transaction, Sir *Edward Brett* made his will, dated the 22d of *December*, 1682; and therein recited as follows, viz. “Whereas by deed indented, I did purchase of “*Edward Brewster*, deceased, all that the capital messuage “called *Blendon Hall*, &c. which was heretofore the lands “and inheritance, or reputed to be the lands and inheritance of Sir *John Wroth*, deceased, and lately purchased “by me for the residue of the term of 1000 years, then to “come and unexpired; in which deed there was a covenant “from the said *Brewster*, that Sir *John Wroth* and his heirs, “in whom the fee of the premises was vested, should convey “the same to me and my heirs: But the said Sir *John Wroth* “dying before such deed was executed, and leaving issue an “infant, not above the age of eight years, ’tis at present “impossible to have the fee conveyed to me; wherefore, I do “hereby declare, and ’tis my will and desire, that a conveyance



1736.

“veyance be executed by the heirs of Sir *John Wroth*, when they shall attain to their full age, according to the settlement in tail hereafter mentioned.” The testator then devised the said premises to *John Fisher*, eldest son of *Henry Fisher* and *Elizabeth* his wife, for the term of his natural life; remainder to trustees, to preserve contingent remainders; and after the death of the said *John Fisher*, to the first son of the body of the said *John Fisher*, and the heirs male of the body of such first son; remainder to the second, third, fourth, fifth, sixth, seventh, eighth and every other son of the said *John Fisher* successively in tail male; remainder to *Nathaniel Fisher*, second son of the said *Henry Fisher* for life; with remainder to trustees to preserve contingent remainders; and then to the first and other sons of the said *Nathaniel* in tail male; remainder to *Edward Fisher*, third son of the said *Henry Fisher*, and his sons in like manner; remainder to all and every other the son and sons successively, of the said *Henry Fisher* and *Elizabeth* his wife, and the heirs males of the body of every such son and sons, according to their seniority; and for default of such issue, to the right heirs of *Stephen Beckingham*, Esq; and *Richard Watson*, Gent. their heirs and assigns; and the said testator directed, that the remainder of the said term should remain and be attendant on the inheritance of the premises, according to the limitations aforesaid: And as for all other his real and personal estate, he devised the same to the said *John Fisher*, *Nathaniel Fisher* and *Edward Fisher*; the elder of them to have a double share, and the rest between the other two; and made the said *Stephen Beckingham* and *Richard Watson*, executors of his will; and the testator also directed, that every person to whom the premises was limited by the devises aforesaid, should take upon him and use the surname of *Brett*.

In 1683, the testator died, and the said *John Fisher* took upon him the name of *Brett*, and entered on the premises; and afterwards the said *Henry Fisher* and *Elizabeth* his wife died, leaving issue only three sons, the said *John Brett Fisher*, *Nathaniel Fisher* and *Edward Fisher*; *Nathaniel Fisher*, the second son, died without issue, having made his will, and appointed his brother *Edward* executor thereof, who proved the same; and afterwards died without issue, having also made his will, and appointed the said *John Brett Fisher*, executor thereof, who duly proved the same.



On the 18th of March, 1713, the appellant *Nathaniel Wilkins Brett*, as heir of *Richard Watson*, one of the executors of *Sir Edward Brett's* will, exhibited his bill in the Court of Chancery, against the said *John Brett Fisher* and *Edward Fisher*, and against some of the tenants of the premises; praying, that the said *John Brett Fisher* and *Edward* his brother, might be enjoined from cutting down timber on the premises, or committing any waste thereon.

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All the defendants having put in answers to this bill, the cause came on to be heard before Mr. Justice *Tracy*, in the absence of the Lord Chancellor *Cowper*, on the 25th of November, 1715; when it being suggested, that as it did not appear that the inheritance of the premises was actually conveyed by *Sir John Wroth*, or his heirs, there was a possibility that the heirs of *Sir John* might set up some claim to the premises, whereby the appellant's title to the fee simple in remainder might be rendered precarious; it was ordered, that upon the appellant's giving security, to indemnify the defendant *John Brett Fisher*, against the heirs of *Sir John Wroth*; it should be referred to a Master to see what timber had been felled, and the value of it, since *Sir Edward Brett's* death; whereof the defendant *John Brett Fisher*, was ordered to pay one moiety to the plaintiff; but as to the other moiety, no directions were given: And the injunction which had been granted, was continued, and the deeds and writings were to be brought into Court for the benefit of both parties.

Afterwards, on the application of the then defendants, the cause was reheard by Lord *Cowper* on the 5th of May, 1716; who was pleased to order, that the appellant should be at liberty to amend his bill, and make the heir of *Sir John Wroth* a party; and the injunction was continued till further order.

The bill was accordingly amended, and *Sir Thomas Wroth*, the heir at law, made a party thereto; who, on the 14th of March, 1716, put in his answer, and thereby said he believed, that *Sir John Wroth* his grandfather, or *Sir John* his father, did not sell, or otherwise convey the premises to *Brewster*; and hoped, if any right of redemption of the mortgage remained in him, it should be preserved to him both as to the premises and the timber felled.



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After this answer was put in, the appellant did not think fit to proceed any further in his cause, till after the death of the said *John Brett Fisher*; who died without issue on the 14th of November, 1732.

In *Easter* term 1733, the appellant exhibited a bill of revivor and supplement, against the respondents, and *Stephen Beckingham*, sen. as the surviving executor of Sir *Edward Brett's* will, and *Stephen Beckingham*, jun. his son; and also against *Thomas Troyte* and Dame *Cecilia* his wife, and *Thomas Palmer* and *Elizabeth* his wife, the said *Cecilia* and *Elizabeth* being the heirs at law of Sir *Thomas Wroth*; thereby praying to be let into possession of the premises, and that such of the defendants in whom the 1000 years term was vested, might assign the same to the appellant; and that such of them, in whom the legal estate in the inheritance was vested, might convey the inheritance to the appellant; and that the former decrees might be revived, and the appellant have the benefit thereof.

To this bill, the respondent *Jacob Sawbridge* put in his answer; and thereby set forth the original mortgage from Sir *John Wroth* the grandfather, to *Francis Hill*, and the several assignments thereof before mentioned, and also Sir *Edward Brett's* will; and after taking notice of the deaths of the said *Nathaniel* and *Edward Fisher*, and of their respective wills, and that they died without issue; he stated, that *John Brett Fisher*, being indebted to the defendant *William Newland* in 100*l.* by deed poll, dated the 3d of *October*, 1728, assigned the premises to the said *Newland*, for the remainder of the said term of 1000 years, subject to a proviso for making void the same, on payment of 100*l.* and interest, by the said *John Brett Fisher*; and that, by an indorsement on the said deed poll, dated the 5th of *February*, 1731, the said *Newland*, in consideration of 100*l.* assigned the premises to *Elizabeth Bainbrigg*, subject to the proviso of redemption contained in the said deed poll. — That afterwards, the said *William Newland* came to an agreement with the said *Thomas Troyte* and *Cecilia* his wife, and *Thomas Palmer* and *Elizabeth* his wife as the coheiresses of the said Sir *Thomas Wroth*, for the purchase of the reversion and inheritance of the premises, for 125*l.*; and thereupon, the said *Thomas Troyte* and his wife, and *Thomas Palmer* and his wife,



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wife, in consideration of 125 *l.* to them paid by the said *William Newland*, levied a fine of the premises to *George Thompson* and his heirs; and by indenture, dated the 7th of *March*, 1731, between the said *Thomas Troyte* and *Cecilia* his wife, and *Thomas Palmer* and *Elizabeth* his wife of the one part, and the said *George Thompson* of the other part; the said fine was declared to be to the use of the said *George Thompson* and his heirs, whose name was used in the said conveyance in trust for the said *William Newland*. — That by indenture tripartite, dated the 19th of *August*, 1732, between the said *Elizabeth Bainbrigg* of the first part, the said *John Brett Fisher* of the second part, and *John White* of the third part; in consideration of 100 *l.* paid to *Elizabeth Bainbrigg*, and 250 *l.* paid to the said *John Brett Fisher*, the said *Elizabeth Bainbrigg*, by his direction, and also the said *John Brett Fisher*, assigned the premises to the said *John White*, his executors, &c. for the residue of the term of 1000 years, subject to redemption, on payment by the said *John Brett Fisher* of 367 *l.* 10 *s.* to the said *John White*; whose name was used therein, in trust for the respondent *Jacob Sawbridge*. — And that afterwards, by indentures of lease and release, dated the 18th and 19th of *August*, 1732, in consideration of 150 *l.* therein mentioned to be paid by the respondent *Jacob Sawbridge* to the said *George Thompson*, (but which was really paid to the said *William Newland*) the said *George Thompson*, by the direction of *Newland*, conveyed the said premises to the respondent *Jacob Sawbridge* and his heirs. And the respondent *Sawbridge* further set forth, by his said answer, that the said *John Brett Fisher* died about the 4th of *November*, 1732; and that before his death he made his will, and thereby devised the premises, and all other his real and personal estate, to the respondent *Jacob Sawbridge*, his heirs, executors, administrators and assigns, and appointed him executor of his said will, who duly proved the same; and the respondent insisted, that by virtue of the said will, and the several deeds before set forth, he was entitled not only to the remainder of the said term of 1000 years, but also to the inheritance of the premises comprised therein.

The respondent *Peter Delamotte* put in his answer to the said bill, and therein set forth, that believing the said *Jacob Sawbridge* had a good title, he took a lease from him of the said capital messuage and some lands, part of the premises, for the term of 21 years, at a pepper-corn rent for the first two



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years, and at the rent of 45*l.* a year for the remainder of the said term; and that relying on a quiet enjoyment of the premises in his lease, he had laid out considerable sums in improving the same; and therefore insisted on his right to hold the premises in his said lease, for the residue of the said term, under the rents and covenants therein reserved and contained.

This supplemental cause being at issue, and witnesses examined, came on to be heard before Sir *Joseph Jekyll*, Knt. Master of the Rolls, on the 11th of *December*, 1734, when his Honour being of opinion, that the appellant had made out no title to the inheritance of the premises, as heir at law of the said *Richard Watson*, was about to dismiss his bill; but it being then insisted by the appellant's counsel, that he had a right to the premises for the residue of the said term of 1000 years, under Sir *Edward Brett's* will, but having made out no title thereto in his bill; his Honour was pleased to order, that the appellant should pay the defendants the costs of the day, and be at liberty to amend his bill, and make proper parties, and bring on his cause again to a hearing; but he was to amend his bill by the first day of the next term, or in default thereof, the same was to be dismissed.

Accordingly, the appellant amended his bill, by charging, that in case the said Sir *Edward Brett* had only a term for years in the premises when he made his will, the remainder thereof, subject to the estate for life thereby given to the said *John Brett Fisher*, *Nathaniel Fisher* and *Edward Fisher*, with contingent remainders to their first and other sons respectively, did vest in *Catherine Wilkins*, otherwise *Watson*, who was the heir at law of the said *Richard Watson*, at his death; and that she dying intestate, administration of her personal estate had been granted to the appellant, and that by virtue thereof, he was become entitled to the residue of the said term.

On the 20th of *February*, 1734, the said cause came on again to be heard before his Honour the Master of the Rolls, who, after he had fully heard what was alledged by the counsel on either side, took time to consider thereof; and after mature deliberation, his Honour, on the 10th of *May*, 1735, was pleased



pleased to declare his opinion, that the appellant had no title to the premisses; and therefore decreed, that the appellant's bill should stand dismissed with costs, as to the respondent *Peter Delamotte*; no costs being asked for the other defendants.

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From this decree the appellant appealed; and on his behalf it was said, that there were but two objections insisted on by the respondents against his demands: I. That Sir *Edward Brett* having devised the premisses as an estate of inheritance, and not as a term, and having, in fact, only a term and no inheritance, the term would not pass. And II. That if he intended to devise the term, the limitation to the right heirs of *Stephen Beckingham* and *Richard Watson* was too remote, and therefore void. — To the first of these objections it was answered, that the respondents were not at liberty to insist, that the testator had not the legal or equitable estate of inheritance in him; for that the conveyance to *John Brett Fisher*, under whom they claimed, from the heirs of Sir *John Wroth*, ought to be understood to be in pursuance of the intent of the testator, and of that equitable right to which he apprehended himself to be entitled. But if he was not to be considered as entitled to the inheritance, it was conceived that there could be no reason to overturn his will entirely, because it could not take effect in the full extent which he intended. And as to the other objection, it was said, that the intermediate limitations to the sons of *John Brett Fisher*, *Nathaniel Fisher* and *Edward Fisher*, were all of them contingent only, and to happen within the compass of lives then in being; and as these contingencies never did happen, and the limitation to the heirs of *Beckingham* and *Watson* was to take effect immediately on the failure of these contingencies, it could not be too remote, since there never was any person in being who had, or was entitled under the will to have, any greater estate than what was determinable on lives then in being. And therefore it was hoped, that the decree would be reversed.

D. Ryder.

N. Fazaker-  
ly.

On the other side it was argued, that as to the inheritance of the premisses, which the appellant claimed by his original and supplemental bills, (tho' if he had any title, it could only be to a moiety of the premisses, as *Stephen Beckingham* the elder was still living) there was no proof, nor did it appear by any of

J. Willes.

J. Strange.



1736.

of the deeds set forth in the pleadings, that Sir *Edward Brett*, or any person in trust for him, at the time of making his will, either had, or was entitled to any greater estate in the premises, than only for the remainder of the mortgage term of 1000 years; neither was there any evidence, that the heirs of Sir *John Wroth* were under any obligation to release the equity of redemption of the premises, or to convey the inheritance thereof to Sir *Edward Brett* and his heirs. That tho' *Brewster*, in the assignment of *January*, 1672, to *Richard Watson*, in trust for Sir *Edward Brett*, had covenanted, that all persons claiming under Sir *John Wroth*, should, within seven years, do any further act for assuring the premises to *Watson* for the remainder of the term; yet that covenant would not bind the heirs of Sir *John Wroth*, nor could it extend to the inheritance, but was only for better assuring the premises for the residue of the term: And the testator's being deceived by *Brewster*, who covenanted for what was not in his power, could not give Sir *Edward Brett* a title to the inheritance, either in law or equity; and therefore, tho' Sir *Edward* took upon him to devise the inheritance, yet he had no right to do so, nor could the inheritance pass by his will; he having no legal or equitable estate or interest therein, and consequently the appellant could have no title thereto. As to the term of 1000 years, it appeared very plainly by Sir *Edward Brett*'s will, that he had no intention to devise it as a term in gross; he having expressly directed, that the remainder of the lease for 1000 years should be attendant upon the inheritance of the premises, according to the limitations in his will; and those limitations were such, as were proper only for an estate of inheritance, and not for a term of years. And as he did not intend to devise the term, as a term in gross, but only to devise the inheritance, which he had not; so neither could he entail the term in such manner as he had limited the premises by his will, if he had been minded so to do; because such limitation of a term tended to create a perpetuity: And the limitation to the heirs of *Watson* and *Beckingham*, after failure of issue male of *John Brett Fisher* and his two brothers, was void in its creation, and was such an executory devise, as could never take place by the rules of law. That tho' in fact, *Henry Fisher* left no other sons than *John Brett Fisher* and his brothers, and that they all died without issue,



issue, yet that would make no alteration in the case; for the will must be construed as things stood at the time of making it, without regard to any future event. Besides, the testator's intention was plain, that the limitation over was to take place upon failure of issue generally, be it when it would, and not upon failure of issue within such a reasonable time as the law allows of; for he entailed the estate by proper and technical words, under an apprehension of his having a power over the inheritance, and of limiting a remainder after the estates tail should be determined; and if the limitation to the heirs of *Watson* and *Beckingham*, was not good when the will was made, nothing which had happened since could make it good.

1736.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.  
Jour. vol. 24.  
p. 631.

Sir *Lister Holt*, Bart. an Infant, by his } Appellants.  
next Friend, and *Francis Welles*,

Case 33.

*Robert Lowe*, Esq; - - Respondent.

19th April, 1736.

**WILLIAM**, Lord *Brereton*, being seised in fee of the impropriate rectory of *Middlewich*, and of the advowson and vicarage of the said church, as appendant to the rectory, and being minded to sell the same, agreed with *Robert Lowe*, the respondent's grandfather, for the sale thereof; and in pursuance of this agreement, the said *William* Lord *Brereton* and *Elizabeth* his wife, and *William*, their son and heir apparent, in 1664 levied a fine *sur conusance de droit come ceo*, &c. in consideration of 1000*l.* therein mentioned to be the purchase money, in the court of the county palatine of *Chester*, to the said *Robert Lowe* and to *Edward Minshall*, *Gabriel Hodson* and *John Wilson*, (who all three afterwards died in *Lowe's* life-time) and to the heirs of the said *Robert Lowe*, and warranted the same against the said Lord *Brereton* and his heirs



1736.

heirs for ever. And the 1000*l.* purchase money then paid by *Lowe*, was a full price for the absolute purchase of the premises.

At the time of this purchase, one *Lawrence Griffith* was Vicar of the church, and afterwards died in possession of the same in the year 1680; and upon his death, the respondent's father *Samuel Lowe*, being then entitled to the advowson under the said purchase, would have presented to the vicarage; but *Lawrence Griffith* having never been instituted to the same, the Crown became entitled to that turn of presenting thereto by lapse; and accordingly presented one *Thomas Falkner*, who was thereupon instituted and inducted.

But *Falkner*, refusing to take the oaths required by law, was therefore deprived of the vicarage, and the same again became void; whereupon the respondent's father would have presented thereto, but could not prevail on his Clerk to accept the same, till *Falkner* should be actually put out of the possession thereof; *Samuel Lowe* therefore prosecuted him both in the Ecclesiastical Court and at law, for that purpose; but before he could recover the possession of the vicarage, the then turn of presentation thereto became likewise lapsed to the Crown, who presented one *William Handfull*, Clerk; who was instituted and inducted into the same, but was afterwards removed for incontinency.

Upon his removal, *Samuel Lowe* presented *John Cowper*, Clerk, who was instituted and inducted into the vicarage, and continued in possession till his death, which happened in September, 1718; and during all these transactions, the appellants, or any of those under whom they claimed, never pretended any right to the rectory, advowson, or vicarage; but on the contrary, the ancestors of the respondent, ever after the purchase in 1664, were and continued in possession and enjoyment of the rectory, glebe lands, tithes and chancel of the church, and paid the charges growing due out of the rectory, and in every respect acted as owners of it about 50 years together next after the said purchase, and until 1718; when upon the death of *Cowper*, *Francis Lord Brereton*, took upon him to present one *John Cartwright* to the vicarage, who was instituted and inducted.

Where-



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Whereupon *James Lowe*, the respondent's brother, being then entitled to the premises under the said purchase, brought his *quare impedit*; but his title proving to be only an equitable one, by reason of some settlements and provisions in the family made after the purchase, he was disappointed in that suit; and therefore he filed his bill in the Court of Chancery, for relief in the premises; but there happening several abatements of the proceedings by deaths, the matter was not determined before the death of *John Cartwright* the incumbent, which happened on the 7th of *January*, 1730.

Upon *Cartwright's* death, the respondent, who was then entitled to the premises, presented *John Swinton*, Clerk, to the vicarage, who was duly instituted and inducted. And afterwards the appellants brought their *quare impedit*, to recover that turn of presentation, claiming the same under some conveyance from the family of *Brereton*.

To which, the respondent having pleaded his title to the rectory and vicarage, under the purchase and fine above mentioned; the appellants, in *Easter* term, 1734, exhibited their bill in the Court of Exchequer, for a discovery of the deeds and writings, declaring the uses of the said fine.

In bar to this discovery, the respondent pleaded the purchase so made by *Robert Lowe*, his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage, and also the payment of the said sum of 1000*l.* the purchase money mentioned in such fine. — That proclamations were duly made upon the said fine, as appeared by the indorsements thereon, and that no claim was made to the premises within five years next after the levying thereof; that *Robert Lowe* the purchaser, survived the other conusees; that the rectory and advowson, by several mesne conveyances and descents from the said *Robert Lowe*, became vested in the respondent; and that *Robert Lowe*, the purchaser, and those claiming under him, enjoyed the premises for 50 years and upwards, next after the time of levying the said fine, without any claim of title, or interruption from any person whatsoever: He also by his plea insisted on the statute of limitations, 21st *James I.* and that *Robert Lowe*, the purchaser, had not any notice at the time of levying the said fine, or at the time of payment



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payment of the said purchase money, of the title set up by the appellants, or of any title under which they claimed.

And in support of his plea, the respondent, by way of answer, said he believed the said *Robert Lowe*, to whom the fine was levied, was an honest purchaser of the rectory, and paid the 1000*l.* mentioned in the fine and more for the purchase thereof, and that the same was the best price which could be then gotten for the same; and also, that the said Lord *Brereton* intended to sell the rectory without any reservation; and denied that any advantage was taken of *John Lord Brereton's* lunacy, at the time *William Cowper* was presented, as was suggested in the bill.

On the 9th of *November*, 1734, this plea came on to be argued before the Barons; when, after hearing counsel on both sides, they were pleased to order that the plea should be allowed.

J. Willes.  
N. Fazaker-  
ly.

From this order the present appeal was brought; and on behalf of the appellants it was argued, that the fine insisted by the plea to have been levied to *Robert Lowe*, *Minshall*, *Hodson* and *Wilson*, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine said to have been levied in 1667, to the said *Robert Lowe*, of divers parcels of the said rectory; and by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to shew that the uses of the first fine did result to the conusors, or at least, as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and therefore the first fine ought not to have been pleaded in bar to such discovery, without a denial of the particular circumstances charged by the bill as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill touching the second fine, and the declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprised therein;



in; and this admission was a strong evidence against him to shew, that the first fine was levied only for the purposes above-mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprised in the second fine, and the declaration of the uses thereof. That it did not appear by the plea, what was the real purchase money of the advowson, nor that the same was paid by *Robert Lowe*, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence therefore of his ancestor's being a purchaser, without any notice of the appellants title, was without foundation. And as to the quiet enjoyment, the fine and non-claim, and the statute of limitations, set up as a bar to the discovery sought by the appellants; it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellants bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent, was a presentation about the year 1702, which was during the lunacy of Lord *John*; and since that time Lord *Francis*, his heir, presented the last incumbent, and regained the possession of the vicarage. It was therefore hoped, that the said plea would not bar the appellants of a full discovery of the respondent's title; but that the order for allowing the same would be reversed.

On the other side it was contended, that *Robert Lowe*, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for 1000*l.* without any notice of any other title; and therefore, by the known and established rules and practice of Courts of Equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a Court of Equity in respect to such title. That by the fine, proclamations and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants by their bill claimed the same, was utterly

J. Strange.

R. Fenwick.



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and effectually barred and defeated both at law and in equity; and therefore the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs.

ORDER  
reversed.  
JOUR. vol. 24.  
p. 650.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be reversed; and that the plea should stand for an answer, with liberty to except so far, as to oblige the respondent to discover any conveyance or conveyances made by *William Lord Brereton* and *Elizabeth* his wife, and *William Brereton*, Esq; their son, or any or either of them, to *Robert Lowe* the respondent's grandfather, alone, or jointly with any other person or persons; and to discover any deed or deeds declaring the uses of a fine, in the pleadings mentioned to be levied in the 16th year of King *Charles II.* or declaring the uses of a fine in the pleadings also mentioned to be levied in the year 1667.

Case 34. *Dennis Delane*, - - - Appellant.

*Dennis Delane*, *Patrick Delane*, Clerk,  
*Joan Delane*, *Elizabeth Delane*, *Jane*  
*Delane*, *Owen Lloyd*, *Richard Ryley* } Respondents.  
 and *Ann* his Wife, *George Delane* and  
*William Longfield*, - - - }

24th March, 1736.

*DENNIS Delane*, deceased, having been several years married, without any issue, came to a resolution of settling his whole estate, both real and personal, upon the appellant, the second son of his eldest brother *Solomon Delane*, Clerk; who was accordingly taken under his care, and maintained and educated, and in all respects treated and considered by him as his own son, during the remaining part of his life.

In the year 1707, the said *Dennis Delane* contracted for the absolute purchase of the inheritance of the lands of *Killreagh*, *Tullin Keelty*, *Liffenyskey*, and *Killtrustan*, situate in the county of *Boscommon*, from *John Bollingbrook*, Clerk, and Mr. *John Massy*, and actually paid down the sum of 623*l.* for the purchase



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chase thereof; but as there were some reasons why it might not be proper that his own name should appear in the transaction, and more particularly from an apprehension, that the sum laid out upon this occasion, might be supposed to be part of the money then in his hands belonging to the Bishop of *Elphin*, or other persons, whom he served as steward and agent, in the receipt and collection of their rents, as well as in the management of their other affairs; the said *Dennis Delane* chose the conveyances should be made to *George Delane*, a younger brother of his; and accordingly, at his instance, Mr. *Bollingbrook* and Mr. *Massey* did, for the aforesaid consideration, grant and convey all and singular the premises unto the said *George Delane*, his heirs and assigns for ever.

Immediately after this purchase, the said *Dennis Delane* entered upon the premises, and received the rents, issues and profits thereof to his own use so long as he lived, and was reputed by every body the owner and proprietor thereof; and frequently declared his intentions of settling, and he did accordingly settle the same as a provision for the appellant.

In the year 1712, *Dennis Delane* died suddenly, when the appellant was a minor, and at a great distance, being then a student in the university of *Dublin*. Whereupon, the said *George Delane* having had early notice of his death, went immediately to the house of the said *Dennis* in the country, and got into his possession several of his deeds, papers and writings; among which, there was great reason to presume there was some settlement or will in favour of the appellant, and also some declaration of trust executed by the said *George*, declaring such conveyances, though in his name, to be in trust for the said *Dennis* and his heirs.

*George Delane* having thus possessed himself of the deeds of lease and release, whereby the said premises were conveyed to him (but in trust as aforesaid) he then, and not before, set up a pretence, that the conveyance had been originally executed for his own use and benefit; and that he, with his own money, had paid the consideration thereof; and under this colour, he immediately entered upon the lands in question, and not only continued in possession thereof during his life, but some time before his death, which happened in the year 1720, took upon him



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him by his will, to charge the same with divers legacies to and for the benefit of his younger children, the respondents; and with an annuity of 20*l.* to his wife, the respondent *Joan*, for her life; and subject to the said incumbrances, devised the same to the respondent *Dennis* for life; with several remainders to the rest of the respondents.

The appellant's father, *Solomon*, who was the eldest brother and heir at law of the said *Dennis Delane*, and, as such, entitled to have inherited the trust and equitable interest which he had in the premises, in case no disposition appeared to have been thereof made by will or otherwise; did by deed poll, dated the 14th of *December*, 1728, agreeable to his said brother's real intentions and repeated declarations on that head, convey and assign over the said premises to the appellant and his heirs, the better to enable him to sue for and recover the same, in case he should not be able to make out any other more immediate title under the said *Dennis Delane*, against those deriving under the said *George Delane*.

In *Michaelmas* term, 1729, the appellant exhibited his bill in the Court of Chancery of *Ireland*, against the respondent *Dennis*, as heir at law of the said *George Delane*, and against the other respondents the wife and younger children of *George*, and against the respondents *Patrick Delane* and *Owen Lloyd*, who were trustees named in the will of *George*, and also against the said *Solomon Delane*, the appellant's father; praying, that they, as trustees, might be decreed to assign and convey over the legal estate in the premises, to the appellant and his heirs, and to deliver up possession, and account for the rents, issues and profits.

The respondents, by their answers to this bill, admitted that *George Delane* never so much as once viewed the lands, or made any enquiry about the number of acres, measures, bounds, or value thereof; and that the purchase had been first proposed, and afterwards carried on by the said *Dennis Delane*, who continued to let, demise and receive the rents, issues and profits of the premises; but they insisted nevertheless, that the said purchase had been so transacted and carried on for the use and behoof of the said *George Delane*; but, supposing it had not, yet that any trust which might have been intended



for the said *Dennis Delane* not appearing by any declaration thereof in writing, the same was to be considered as null and void by the statute made in *Ireland*, for preventing frauds and perjuries, in the 7th year of King *William III.* The respondent *Joan* however, by her answer acknowledged, that one moiety of the sum so paid as aforesaid, was the proper money of *Dennis*, and not of her husband.

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The cause being at issue, and witnesses examined, came on to be heard before the Lord Chancellor of *Ireland*, on the 16th, 17th, and 18th of *December*, 1731; and to be further heard, on the 28th of *February* following; when his Lordship was pleased to order and decree, that the appellant's bill should be dismissed with costs.

After four years acquiescence under this decree, the appellant thought proper to appeal from it; and on his behalf it was said to appear in proof, that the agreement for the purchase was made by *Dennis*; that *George* was not privy to it; that the purchase money was paid to the vendor by *Dennis*; that he borrowed 150*l.* of a Gentleman to compleat the sum, and afterwards repaid it; that he continued in possession of the premises during his life, and received the rents and profits thereof to his own use: And there was no proof that *George* paid any part of the purchase money, nor was then in circumstances to do so. That all these circumstances, were apprehended to be sufficient evidence to establish a resulting trust for *Dennis*; and the greater weight ought to be given to the appellant's evidence, in regard all the deeds and writings of *Dennis* his uncle, were seized and carried away by *George*, so that the appellant was deprived of making proof of any express declaration of trust. And if these circumstances were sufficient to establish a resulting trust, there was no occasion for a declaration of the trust in writing; because, trusts arising, or resulting by implication, or construction of law, are saved out of the statute of frauds and perjuries.

N. Fazakerly.  
W. Hamilton.

On the other side it was insisted, that the estate in question was not only conveyed to *George Delane* and his heirs, but he also acted as the owner thereof; the lease of it being not only executed by him, but attested by *Dennis* as a witness; and who, in his receipts for the rents, expressed the same to be

D. Ryder.  
J. Browne.



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received for the use of *George*: And considering that *George* survived his brother *Dennis* many years, and that the appellant and his father *Solomon* acquiesced under the right of *George*, and the respondents his devisees, from the death of *Dennis* in 1712, to the year 1729, when the appellant filed his bill, being near 17 years; it was hoped, that the pretence of a trust set up at such a distance of time, and so long after the death of all the parties between whom the matters were transacted, did not deserve the least encouragement. That the statute of frauds, was a good and effectual bar to the relief sought by the appellant's bill; and if in cases of this nature, parol evidence should be admitted to establish a trust of lands, it would again introduce those great and dangerous mischiefs, for the prevention whereof that law was made. That *Solomon*, the heir at law of *Dennis*, and father of the appellant, and under whose conveyance the appellant claimed, was never in possession of any part of the premises; and the conveyance of a pretended title, by a person who has never been in possession, is not only disallowed by the common law, but is also prohibited by the statute; and therefore ought not to receive any countenance from a Court of Equity.

DECREE  
affirmed,  
Jour. vol. 25.  
p. 59.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents, 100*l.* for their costs, in respect of the said appeal.



The Most Noble *Catherine* Dutcheſs of  
*Buckinghamſhire*, Widow and Relict  
of *John* Duke of *Buckinghamſhire*, } Appellant.  
and alſo Mother and Executrix of *Ed-*  
*mund* Duke of *Buckinghamſhire*,

*Charles Sheffield*, Eſq; *Joſeph Cox*, Eſq, }  
and *Sophia* his Wife, *John Walker*, }  
D. D. and *Charlotte* his Wife, and } Respondents.  
*Allen* Lord *Bathurſt*, and *Patrick Gar-*  
*den*, Eſq; ſurviving Executors and }  
Trustees of Duke *John*,

29th March, 1737.

*JOHN*, Duke of *Buckinghamſhire*, in his life-time, made his  
will, (all of his own hand writing) dated the 9th of *Au-*  
*guſt*, 1716; and thereby, amongſt other things, gave and deviſed  
to the Right Honourable *Charles* Earl of *Orrery*, *George* Lord  
*Willoughby de Brooke*, *Thomas* Lord *Trevor*, and to the reſpond-  
ents *Allen* Lord *Bathurſt*, and *Patrick Garden*, their heirs,  
executors and aſſigns reſpectively, all his manors and lordſhips  
of *Normanby*, *Burton*, *Butterwick*, *Croſby*, *Coniſby* and *Flix-*  
*borough*, in the county of *Lincoln*, with all their rights, mem-  
bers and appurtenances; and alſo the manor of *Dunſly* in *York-*  
*ſhire*, which he purchaſed of Mr. *Fairfax*; in truſt only, and  
for the ſole uſe and benefit of ſuch perſons as he then did, or  
ſhould thereafter nominate, appoint and chooſe; he alſo gave and  
deviſed to the ſame perſons, whom he conſtituted his executors,  
and to their heirs for ever reſpectively, all his other real and  
perſonal eſtate whatſoever; to be diſpoſed of to ſuch perſons,  
and to ſuch uſes only, as he then did, or ſhould thereafter direct  
and appoint.

In the firſt place, his will and meaning was, that the appel-  
lant ſhould have, during her life, his new built houſe in *St.*  
*James's* Park, with the two wings adjoining, and all the ſtables,  
gardens, courts and green houſes, thereunto belonging, with  
all



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all his oil and water-coloured pictures and statues therein, except what he should particularly mention and give away otherwise, either then or thereafter. But he gave all these things and this house also for her life, upon this express condition only, that if the appellant should at any time marry again, then his will was, that the said house with the said two wings, pictures and statues, should go forthwith to his eldest son and his issue; and if all his issue male should die, then to his eldest daughter and her issue; and if the testator left no lawful issue, then to the respondent *Charles Sheffield*, by his then name of *Charles Herbert*; and if he should die without issue, then to the testator's two natural daughters, the respondents *Sophia* and *Charlotte*.

In the next place his will was, that his eldest son and his issue, and if the testator left none, his eldest daughter and her issue, should, after his death, have all his whole estate real and personal; except what he had given to the appellant, and should give by other dispositions to her, or to any other uses, or to his natural children. — Then his will was, that the respondent *Charles Sheffield* should have 7000*l* paid by the trustees at the testator's death, and that Mr. *William Bromley* should have the tuition of him till the age of 21; also that the respondents *Sophia* and *Charlotte* should have 1000*l*. a-piece paid for their use and benefit, at the time of the testator's death, or as soon after as could be; and he directed, that all those three children should carry his name and arms, with the accustomed distinction of natural children.

The testator then directed his trustees to dispose of all his estate, both real and personal, according to their judgment, for the advantage of all those to whom he had given it; particularly directing them to buy land, by advice of Chancery, with all the money which he had given thereby to his dearest son as aforesaid. And if he should be so unhappy, as that no legitimate son or daughter of his, should live to leave at any time, the blessing of any child behind them; in such case of their dying thus, without leaving any issue behind them, he directed, that the respondent *Charles Sheffield* and his issue, should have all his estate, both real and personal, just in the same manner, and with the same restrictions and exceptions as



to the appellant; and on condition also, that he added 5000*l.* to each of the respondents *Sophia* and *Charlotte*, and that he paid also to his mother, Mrs. *Lambert* 1000*l.*; and if he should die with only issue female, then the testator directed, that all his estate should be equally divided among his the respondent *Charles Sheffield's* daughters, and the respondents *Sophia* and *Charlotte*; and if the respondent *Charles Sheffield* should die childless, then and in that case the testator directed, that all his said real and personal estate should go to the respondents *Sophia* and *Charlotte*, with the same restrictions and exceptions

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And in case the testator should die, without leaving any legitimate issue male, he gave to his nearest kinsman *Robert Sheffield*, all his stock at the allum works; on condition, that he performed all the contracts which the testator had made with any person about allum; and in case his said kinsman should not so engage to perform his said contracts, he thereby gave all the said stock at his allum works, to the respondent *Charles Sheffield*.

Provided nevertheless, that all the persons intended to take any real estate in the premises, and also the husband and husbands of every such woman or women, to whom any estate was therein before limited or devised; should, within three months next after they should severally come to be in the possession of any part thereof, take upon him, her and them the surname of *Sheffield*, and endeavour to procure, as soon as they could, an act of Parliament for the calling him, her and them by the name of *Sheffield*, and for their stiling themselves in all deeds and writings by the surname of *Sheffield*; and if they should refuse or neglect to take upon him, her or them the said surname of *Sheffield*, within three months in manner aforesaid; and should not, within three years, use his, her and their utmost endeavours to procure such act of Parliament as aforesaid; then the whole estate and estates therein devised to him, her or them so refusing or neglecting, or to the woman or women, whose husband or husbands should so refuse or neglect, should cease and be void; and then and from thenceforth, the person or persons who, by virtue of his said will, should be next in remainder, might enter into and enjoy the same, taking upon



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him, her or them the surname of *Sheffield*, and endeavouring to procure such act of Parliament as aforesaid.

And the testator also gave and bequeathed to his trustees and executors, all his money, and all other his personal estate, *not otherwise before given, or disposed of*; in trust, that they, or the survivors or survivor of them, should sell and dispose thereof for the most money that could be got for the same, and should put out at interest such money for the best advantage they could make, till the same could be laid out by them in some good purchase of lands, tenements or hereditaments in fee simple, free from incumbrances; and they were thereby directed to make such purchase accordingly, and to settle the same lands, tenements and hereditaments, to and upon the same persons and uses, and upon the like trusts, limitations and conditions, as his real estate was in his said will given and devised; and that the interest should go, as the rents and profits of the lands when purchased were to go.

The Duke afterwards made two codicils, both also of his own writing; and died on the 24th of *February*, 1720, leaving issue *Edmund*, Duke of *Buckinghamshire* and *Normanby*, his only son and heir, an infant of tender years; and soon after the testator's death, his executors proved his said will and codicils, and took upon themselves the execution of the trust and executorship.

In *Easter* term, 1721, Duke *Edmund*, by his next friend, exhibited his bill in the Court of Chancery, against the appellant and the trustees and executors, and the respondents *Charles Sheffield* (then *Herbert*) *Sophia Cox* (then *Sheffield*) and *Charlotte Walker* (then *Sheffield*); praying, *inter alia*, that a proper allowance might be settled out of his estate for his maintenance and education, from time to time; and that the rents and profits of his estate, from his father's death, might be annually accounted for, and the clear residuum thereof improved for his benefit.

In *July* following, the respondents *Charles Sheffield*, *Sophia Cox* and *Charlotte Walker*, by their next friends, likewise exhibited their bill in the Court of Chancery, against the said *Edmund*,



*Edmund, Duke of Buckinghamshire and Normanby* and the appellant, and the executors and trustees; praying, that the late Duke's debts and legacies might be paid, and that the legacies to the then plaintiffs might be effectually secured, to be paid to them as soon as they should be capable of receiving the same; and that the same might, in the mean time, be so disposed of and employed, as that they might have the benefit thereof for their maintenance and education; and that the several trusts created in and by the said will, might be executed and performed, and all matters and methods done and taken in relation thereto, for the benefit and advantage of such as were, or should be concerned in the said estates, under the said will.

The several defendants to both these bills having put in their respective answers, the plaintiffs in each cause replied, and issue being joined, and several witnesses examined, both causes came on to be heard together, before the Lord Chancellor *Macclesfield*, on the 22d of *December*, 1721; who declared, that the said will and codicils were well proved, and that the same ought to be established, and the trusts therein performed, and decreed the same accordingly; and it was also decreed, that an account should be taken by the Master, of the testator's personal estate, not specifically devised, which had come to the hands of any of the parties respectively, or to the hands of any other person for their respective use; and the Master, in taking the said account, was to make all just allowances; and it was further decreed, that the specific legacies should be delivered to the persons to whom the same were devised; "and that the  
"rest of the testator's personal estate, after his debts and legacies paid, and all other just allowances thereout deducted;  
"should be invested in a purchase or purchases of lands, tenements and hereditaments in fee simple, free from incumbrances, to be approved by the Master; who was to see such  
"estate, when purchased, settled upon the persons and uses,  
"and upon the like conditions, as the testator's real estate which  
"passed by the will was directed; and in the mean time,  
"until such purchase or purchases could be found, the said  
"personal estate was to be put out upon security or securities,  
"to be allowed of by the Master at interest for the best advantage, which interest was to go as the rents of the lands when  
"purchased were to go;" And it was further ordered, that  
the



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the Master should take an account of the rents and profits of the testator's real estate, not settled upon or devised to the appellant, which had accrued due since his death; and the Master was to appoint one or more person or persons to receive the rents and profits of such real estate, and also of the personal estate for the future, and to allow them salaries in respect thereof; such receiver or receivers first giving security, to be allowed of by the Master, duly to account for and pay what should be by them respectively received; and such receivers were, at least once in every year, respectively to account before the Master for what they should so receive; and the rents and profits of the said real estate, and the interest of the surplus of the personal estate, above what should be allowed thereout for Duke *Edmund's* maintenance and education, were to be, from time to time, put out and improved at interest upon security, to be allowed by the Master, for the said Duke's benefit, and a distinct account was to be taken and kept thereof; and the Master was to tax all parties their costs of those suits, which were to be paid out of the testator's estate; and any of the parties were to be at liberty, from time to time, to apply to the Court for such further directions as might be proper.

Upon the motion of counsel for Duke *Edmund*, praying, that the sum of 30,000*l.* part of the *South-sea* stock belonging to the testator, might be sold in order to pay for the purchase of some estates in the county of *York*, which had been contracted for; it was, on the 11th of *May*, 1722, ordered, that it should be referred to the Master, to see out of what estate the said 30,000*l.* might be raised for purchasing the said premises, besides the testator's *South-sea* stock; and whether it would be proper and for the benefit of all parties, to have the monies necessary for compleating the said purchase, raised by sale of the said *South-sea* stock, or out of the other personal estate of the late Duke.

The Master, on the 19th of the same month, made his report; whereby he approved of the executors and trustees purchasing the said estates, at the prices and upon the conditions therein set forth; the same being conveyed according to the uses in the late Duke's will. And on the 2d of *June* following, it was  
ordered,



ordered, that the Master should state in a particular manner, by way of estimate, the several parts of the testator's personal estate, and the facts relating thereto.

Accordingly, on the 8th of the same month, the Master made another report; whereby it appeared, that the personal estate of the late Duke (over and above the jewels, household goods, coaches and horses given by him to the appellant absolutely, and the pictures, plate and statues given to her Grace for life, or during her widowhood, and afterwards to go as the house and estate were limited) amounted, at the time of his death, to the sum of 53,012*l.* 16*s.* 8*d.* exclusive of the sums of 48,768*l.* 15*s.* 7*d.* capital *South-sea* stock, and 5000*l.* *African* stock. And on the 9th of *June*, 1722, it was ordered, that the trustees should be at liberty to sell so much of the said *South-sea* stock, as was requisite for answering the purchase of the said estates. And accordingly the stock was soon afterwards sold, and the purchases compleated.

On the 30th of *October*, 1735, Duke *Edmund* died in his infancy and without issue; having first made his will, dated the 14th of *October*, 1734, and thereby devised all his real and personal estate to the appellant, his mother, and appointed her sole executrix.

The said suits and proceedings being abated, as well by the death of Duke *Edmund*, as by the marriages of the respondents *Sophia* and *Charlotte*, the same were afterwards duly revived; and by an order dated the 30th of *March*, 1736, it was ordered, that the possession of the manors of *Normanby*, *Burton*, *Butterwick*, *Crosby*, *Conisby* and *Flixborough* in the county of *Lincoln*, and of the manor of *Dunsly* in the county of *York*, and of the estates purchased in *Yorkshire* in pursuance of the decree, from the several persons mentioned in the report of the 19th of *May*, 1722, should be delivered to the respondent *Charles Sheffield*, without prejudice, and subject to the further order of the Court; and that he should be at liberty to receive the rents in arrear of those estates, that became due since the death of Duke *Edmund*, but that the receivers should, notwithstanding, receive all such rents of those estates as became due before his death, and were then unpaid; and that the respondent



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dent *Charles Sheffield* should, by his consent, pay the rent reserved upon the lease of the allum works made to Duke *John*, which had grown due since the death of Duke *Edmund*, and should grow due whilst he continued in the possession thereof, and indemnify the trustees from the same; but such payments were to be made, without prejudice to any demand that the respondent *Charles Sheffield* might have, to be reimbursed what he should pay, out of the personal estate of Duke *John*.

D. Ryder.

J. Strange.

From so much of this decree and order, as directed the personal estate of Duke *John* to be laid out in the purchase of lands, to be conveyed to the same uses as the Duke had devised his real estates by his will, and that possession thereof should be delivered to the respondent *Sheffield*; the Dutcheſs appealed: And on her behalf it was argued, that upon comparing the ſeveral parts of the will together, it did not appear to have been the teſtator's intention, that the personal estate given to his ſon Duke *Edmund* and his iſſue, ſhould be laid out in land, and ſettled according to the decree; and conſequently, ſuch personal estate abſolutely veſted in Duke *Edmund*, the limitation over being void as too remote, and not warranted by the rules of law or equity; and upon his death became the property of the appellant, as his executrix and reſiduary legatee. It was therefore hoped, that the decree and order would be, in this reſpect, reverſed; and that the personal estate and the lands purchaſed with any part of it, together with the profits and intereſt of both, would be decreed to her.

W. Hamilton.

W. Noel.

On the other ſide it was contended, that it manifeſtly appeared by the will to have been the teſtator's intention, that Duke *Edmund* his ſon ſhould only have an eſtate tail in the real eſtate, and in the lands directed to be purchaſed with the personal eſtate; and that for want of iſſue of his body, and on failure of lawful iſſue of the teſtator, his real eſtate, and the lands to be purchaſed as aforeſaid, ſhould veſt in his natural ſon, the reſpondent *Charles Sheffield*, with ſuch remainders over as in the will are mentioned; ſo that both his real eſtate, and that which ſhould be purchaſed, ſhould be held and enjoyed by one and the ſame perſon. That a will is always ſo conſtrued, as that all parts of it may prevail and have their operation if they can; and therefore, to conſtrue that part of the teſtator's will, whereby



whereby he declared, that his eldest son and his issue, and if the testator left none, his eldest daughter and her issue, should have his whole real and personal estate, to amount to an absolute devise of the *residuum* of such personal estate to the son, his executors or administrators, as contended for by the appellant, was unreasonable and without any foundation; and tended to overturn and destroy almost all the other parts of the will, in prejudice of the respondent *Sheffield*, to whom the testator manifestly intended his real and personal estate should come, on failure of his own legitimate issue. And therefore it was hoped, that the decree and order would be affirmed, and the appeal dismissed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and order therein complained of, affirmed.

DECREE affirmed. Jour. vol. 25. p. 65.

The Mayor, Aldermen and  
Assistants of the Town of } Plaintiffs  
*Shrewsbury*, - } in Error.  
*Corbet Kynaston*, Esq; Defendant

Case 36.

31st March, 1737.

IN *Trinity* term, 1733, a writ of *mandamus* was granted by the Court of King's Bench, directed to the Mayor, Aldermen and Assistants of the town of *Shrewsbury*; reciting, that the said *Corbet Kynaston* was duly elected, sworn and admitted into the office of one of the Aldermen of the said town; but that they the said Mayor, Aldermen and Assistants had, without any reasonable cause, removed him from such his office: The writ therefore commanded them to restore him, or shew good cause to the contrary.

Strange 1051. Viner, vol. 14. p. 583. ca. 4.

To this writ the corporation made a return, that the town of *Shrewsbury* was an ancient town, which had been incorporated by divers names; that King *Charles I.* by his letters patent, dated the 16th of *June*, 1638, after having described the boundaries



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daries of the town, made and constituted them into a body politic, by the name of the Mayor, Aldermen and Burgeſſes; and thereby declared, that there ſhould be for ever nominated and elected out of the free Burgeſſes of the town, one who ſhould be the Mayor, twenty-four who ſhould be called Aldermen, (of which the Mayor ſhould be one) and forty-eight others, who ſhould be called Aſſiſtants of the ſaid town; and that the Aldermen and Aſſiſtants, ſhould be called the common council of the ſaid town; and that the Aldermen and Aſſiſtants ſhould be aſſiſting and adviſing to the Mayor, and to the ſenior Alderman, ſupplying the place of Mayor, in matters relating to the town. — Then the return ſet forth, that the ſaid King, by his charter, appointed a Mayor, Aldermen and Aſſiſtants, (naming them particularly :) That the charter farther granted to the Mayor, Aldermen and Burgeſſes of this town, that on *Friday* next after the feaſt of *St. Bartholomew* yearly, it ſhould be lawful for the Mayor, Aldermen and Aſſiſtants of the ſaid town for the time being, or the major part of them, to elect the ſenior Alderman of the ſaid town, who had not exerciſed the Mayoralty, to be Mayor; and that he, after ſuch election, ſhould, before he ſhould be admitted to exerciſe that office, (*viz.* on *Friday* before *Michaelmas*) take an oath before the late Mayor, for the due execution of his office, and then he might execute his office for a year: That if it ſhould happen, that all the Aldermen ſhould have exerciſed this office, then the ſenior Alderman ſhould be again elected, and the reſt of the Aldermen according to their ſeniority. That the Aldermen ſhould alſo take an oath of office; and that if any of the Aldermen ſhould die, or be removed from the office; within a reaſonable time after ſuch death, or removal, the Mayor and the reſt of the Aldermen, or the major part of them, ſhould elect one of the Aſſiſtants into the office, to fill up the number of Aldermen; who ſhould take an oath, and then ſhould exerciſe that office during his life, unleſs he ſhould be removed, for the cauſes mentioned in the charter. That if any of the Aſſiſtants ſhould die, or be elected an Alderman, or be removed, that then they ſhould fill up ſuch vacancy out of the Burgeſſes, who was to take an oath in the manner therein preſcribed, and that then he ſhould continue an Aſſiſtant for his life. That by the ſame charter it

was



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was ordained, that the Mayor, Aldermen and Assistants were to be inhabiting, abiding and constantly residing, in their persons, or with their families, in the said town or suburbs thereof, unless in the time of plague, or other contagious distempers: That it should be lawful for the Mayor, Aldermen and Assistants, or the major part of them, as often as there should be occasion, to remove from his office any Mayor, Alderman or Assistant, for non-residence within the said town and suburbs, and other places particularly mentioned in the charter, or for misbehaviour: That these letters patent were accepted and agreed to by the Mayor, Bailiffs and Burgeesses. And that King *Charles II.* afterwards, by other letters patent, dated the 6th day of *July* in the sixteenth year of his reign, confirmed the former charter; and that the town, by these charters, had been governed ever since. — That the said *Corbet Kynaston* was, on the 10th of *May*, 1717, by the Mayor and Aldermen, elected into the place and office of one of the Aldermen of the said town, then vacant: That he was duly sworn and admitted into that office, according to the charter: That he, upon the 23d of *February*, 1732, and for three years and more last past, was not residing, inhabiting, or abiding in his own person, or with his family, in the town of *Salop*, or within the suburbs thereof, although there was then no plague, or other contagious distemper there; but that during all that time, he neglected, omitted and discontinued the duty and execution of his place and office of one of the Aldermen of the said town, contrary to the directions of the said letters patent: That he was, upon the said 23d of *February*, 1732, and for the time aforesaid, inhabiting, abiding and residing out of, and in places very remote and distant from the said town of *Shrewsbury* and suburbs of the same, to the Mayor, Aldermen and Assistants unknown, tho' there was no plague, or other contagious distemper there at that time; for which cause he became removeable from his said place or office of an Alderman, and subject to be removed by the Mayor and the rest of the Aldermen and Assistants, or the major part of them: That he being so removeable before the issuing of the said writ of *mandamus*, viz. on the said 23d of *February*, 1732, the then Mayor of the said town, viz. *Richard Lloyd*, Esq; and the major part of the then Aldermen and Assistants of the said town, were duly assembled at the *Guildball* of



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the same town, to consult and treat of and concerning the affairs and business of the said town; and being so assembled, then and there did consider what was proper for them to do in respect of the non-residence and absence of the said *Corbet Kynaston*; and it manifestly appearing to them, that the said *Corbet Kynaston*, at that time, and a long time before; viz. for the space of three years and more then last past, was not inhabiting, abiding, or residing in his own person, or with his family, within the town of *Shrewsbury*, or suburbs of the same; and for that he was inhabiting, abiding and residing out of, and in places very remote and distant from the said town of *Shrewsbury*, and the suburbs thereof, to the Mayor, Aldermen and Assistants unknown; although within that time, there was not the plague, or other contagious distemper there; and that he the said *Corbet Kynaston*, for that cause, ought to be removed from his place or office of one of the Aldermen of the said town: The said Mayor, and the major part of the Aldermen and Assistants so as aforesaid assembled, then and there adjudged and ordered, that the said *Corbet Kynaston*, for that cause, should be removed from his said place or office, according to the form and effect of the said letters patent; and that he had not since been chosen into the place or office of an Alderman of the said town. And this they assigned as the cause, why they could not restore him to his office of Alderman of the said town of *Shrewsbury*.

To this return, the said *Corbet Kynaston* pleaded, and traversed several facts set forth therein: And first he said, that he was not, at the time mentioned in the return, by himself or family, inhabiting, abiding, or residing in places, to the Mayor, Aldermen and Assistants unknown, as they had alledged. And upon this the first issue was joined.

He then traversed, that there was not at the time before mentioned any plague, or other contagious distemper, within the said town, or suburbs thereof; but that there were several contagious distempers there during that time: And upon this a second issue was joined.

By his plea he farther traversed, that the said *Richard Lloyd* was Mayor of the said town, at the time in the return mentioned, as by the said return was alledged: And a third issue was joined thereon.

He



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He also traversed, that on the 23d of *February*, 1732, the then Mayor of the said town, and the major part of the then Aldermen and Assistants, were duly assembled to consult and treat of and concerning the affairs and business of the said town, as they had by their return alledged: And upon this a fourth issue was joined.

He said farther, that he was not removed from the place or office of Alderman of the said town, as by the said return was alledged: And upon this a fifth issue was joined.

These issues came down to be tried at the assizes held the 26th of *March*, 1734, at *Shrewsbury*, before the Lord Chief Justice *Reeve*; when the jury found a verdict on the first and second issues, for the corporation: And as to the third, fourth and fifth issues, they found a special verdict to the following effect:

As to the third issue, they found the charter of King *Charles I.* and some farther clauses therein, than were set forth in the return; viz. one clause whereby it was ordained, "That as soon  
" as any one should be elected to be Mayor of the said town,  
" and should die, or refuse the office of Mayor, before he  
" should take the oaths directed by the said letters patent, that  
" then the like election should be immediately made." And another clause, whereby it was directed, "That in case any Mayor  
" should die, or be removed from his office, within one year  
" after he should be so elected as aforesaid, it should be lawful  
" for the Aldermen and Assistants of the said town, or the major  
" part of them, to elect and constitute the senior Alderman of the  
" said town, who had not exercised the office of Mayor, in the  
" place and office of such Mayor." That by another clause in  
" the said letters patent, it was ordained, "That as often as it  
" should happen, that the said office of Mayor of the said town  
" should be vacant, or that the Mayor of the town for the time  
" being, should be hindered by sickness, or be otherwise employed, so that he could not attend the business of the town as  
" Mayor; then and so often, the senior Alderman of the said  
" town for the time being, (having taken an oath of office)  
" should execute the office of Mayor during such vacancy,  
" sickness, or absence: And that a due and impartial election  
" might for the future be had, and for ever inviolably observed;  
" it was by the said letters patent ordained, that the senior of  
" the



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“ the Aldermen, who had not exercised the office of Mayor,  
 “ should be chosen Mayor; and if such senior Alderman, so  
 “ elected, should refuse to execute the office of Mayor, that then  
 “ the senior Alderman next in order after such Alderman so refu-  
 “ sing, should be elected Mayor; and so every other Alderman suc-  
 “ cessively according to the seniority, from time to time, for ever.”

That this charter was accepted. Then they found the charter of King *Charles II.* in such manner as mentioned in the return. They also found, that *Corbet Kynaston* was, upon the 25th of *August*, 1732, the senior Alderman of the said town, who had not exercised the office of Mayor; and that he by himself, or family, was not on the said 25th day of *August*, or for three years then last past had been inhabiting, or resident in the said town of *Shrewsbury*, or the suburbs thereof: That the said *Richard Lloyd* was, on the said 25th day of *August*, an Alderman of the said town, and the next Alderman to the said *Corbet Kynaston* in seniority, who had not exercised the office of Mayor: That the said *Richard Lloyd* being an Alderman of the said town, was on the said 25th day of *August*, being the *Friday* next after the feast of *St. Bartholomew* in that year, by the Mayor, Aldermen and Assistants, or the major part of them, in fact elected into the office of Mayor of the said town, (the said *Corbet Kynaston*, at the time of such election, being the senior Alderman of the said town, who had not exercised the office of Mayor) That before he entered upon the said office, viz. on the 6th of *October* in the same year, he took an oath before *Abraham Davies* the late Mayor, and the rest of the Aldermen and Assistants who would be present, faithfully to execute the office of Mayor; that he was afterwards, in fact, admitted into the exercise of the said office, and did in fact exercise the same for one whole year from thence next ensuing, without interruption: But whether upon the whole matter, he was Mayor of the said town, at the time of the amotion of the said *Corbet Kynaston* from the said office of Alderman, within the intent of the said third issue, they knew not; but prayed the advice of the Court.

As to the fourth issue, they found, that the said *Richard Lloyd* being in fact Mayor of the said town, the major part of the then Aldermen and Assistants of the said town, did, upon the said 23d of *February*, 1732, assemble themselves together in the Guildhall of the said town, to consult and treat of the business of



of the town; but that *Andrew Corbet* of the *Park*, Esq; being then one of the Aldermen of the said town, and having then a house and family in the said town, was not present at the said assembly; neither was he the said *Andrew Corbet* summoned to attend at the said assembly, though the then Mayor gave the usual and general orders for summoning the then Aldermen and Assistants of the said town; nor did *Henry Morgan*, one of the Serjeants at Mace of the said town (being the proper officer to have summoned the said *Andrew Corbet* to attend at the said assembly) endeavour to summon the said *Andrew Corbet*; being informed and believing that he was out of summons, and so returned him at the said assembly to be out of summons, according to the method used of returning persons that are absent and out of summons: But whether, &c.

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And as to the fifth issue, the jurors found, that on the said 23d of *February*, the said *Richard Lloyd*, the then Mayor of the said town as aforesaid, and the major part of the Aldermen and Assistants, being so assembled as aforesaid in the Guildhall of the said town, did then and there, in fact, adjudge and order the said *Corbet Kynaston* to be removed from the said office, or place of Alderman of the said town; but whether, &c.

This special verdict being twice argued before the Court of King's Bench, they were unanimously of opinion, that the return was not sufficient to preclude the said *Corbet Kynaston* from being restored to his office of Alderman; and therefore adjudged, that it should be disallowed and quashed.

To reverse this judgment, the corporation brought a writ of error in Parliament; and on their behalf it was said, that upon arguing the special verdict, there were three objections made. I. That Mr. *Lloyd* was not a lawful Mayor, Mr. *Kynaston* being the senior Alderman when *Lloyd* was elected and sworn Mayor. II. That if Mr. *Lloyd* was not Mayor *de jure*, but only *de facto*, he had no power to summon or preside at the assembly which removed *Kynaston*; and consequently his removal was illegal. III. Supposing Mr. *Lloyd* to be Mayor, and capable of summoning and presiding at this assembly; yet that the Mayor, Aldermen and Assistants, were not duly assembled, for want of summoning Mr. *Andrew Corbet*, one of the Aldermen of the town.

R. Hollings.  
R. Lloyd.



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To the first of these objections, it was answered, that *Lloyd* was apprehended to be a legal Mayor, the corporation not being obliged by their charter, to choose the senior Alderman Mayor at all events; but if they were, yet as the senior Alderman had a power of refusing the office, his wilful absence in unknown parts, must be looked upon as a renunciation of his right to that office. — To the second objection, it was said, that the acts of officers in reputed authority, are to be favoured in Courts of justice; and that there are many cases, where both the judicial and ministerial acts of officers *de facto*, have been held valid: The removal of Mr. *Kynaston* was in pursuance and execution of the authority of the charter, and therefore a valid act, within the reason of the cases which have been established, respecting the acts of officers *de facto*. — And to the third objection, it was answered, that where by accident only, and not through practice or design, a member of a select body is not summoned, the acts of the assembly will be good. That in the present case, the usual and general orders were given by the Mayor for summoning the whole body; and the officer returned Mr. *Corbet* out of summons, according to the method of returning persons who are absent and out of summons; and that more caution to have a regular assembly could not possibly have been used by the Mayor, than what in this instance had been used.

It was further contended to be an undeniable maxim in law, that in special verdicts nothing can be intended, but what is expressly found; and it not being expressly found that Mr. *Andrew Corbet* was within summons, and it being returned that he was out of summons, it could not be intended that he was within summons; but supposing it doubtful, there ought to be a new trial to ascertain so material a fact; for had Mr. *Corbet* been found to have been out of summons, as he really was, there could not remain the least doubt of its being a legal assembly. But besides these reasons, it was apprehended that this was an imperfect verdict, the jury not having found damages and costs in pursuance of the statute 9th *Ann.* c. 20. and therefore no judgment ought to have been given thereon, but a *venire facias de novo* should have been awarded.



On the part of the defendant in error, it was said, that the principal question in this case was, Whether he was legally removed from his office of Alderman or not? And it was apprehended, that he was not well removed, because Mr. *Lloyd*, who presided as Mayor at this assembly, was not a lawful Mayor; the defendant being, when *Lloyd* was chosen Mayor, the senior Alderman who had not exercised that office. That the charter, by which the corporation was governed, prescribed a regular rotation of the Aldermen in the enjoyment of this office; and introduced the direction, with the reasons upon which such order and method was founded; *viz.* "That a due and impartial election may be for the future had, and for ever inviolably observed, it is ordained, that the senior Alderman, who hath not exercised the office of Mayor, shall be chosen Mayor; and so every other Alderman successively, according to their seniority, from time to time for ever." And nothing being found, or appearing by the verdict, sufficient to dispense with, or deprive Mr. *Kynaston* of his right of succession to the mayoralty of this borough, for the year 1732, the choice of Mr. *Lloyd* was a proceeding directly contrary to the express words and direction of their charter, and consequently void. If this conclusion be just, that Mr. *Lloyd* was no legal Mayor, it follows that the assembly at which Mr. *Kynaston* was removed from his office of Alderman, was not a regular assembly; for to constitute a regular assembly, there should be a legal Mayor to summon the members, and to preside therein. As to the objection that Mr. *Lloyd* was Mayor *de facto*, and that such an officer may act, or join in the doing of corporate acts; it may be answered and admitted to be true as to some particular acts of necessity, for the preservation of the corporate body; but that acts of violence, and such as are injurious to the right or property of another, were never allowed to be done by a mere officer *de facto*. That the amotion of Mr. *Kynaston* was not any act of necessity, was plain; because the preservation of the corporate body did not depend upon it: And, that it was injurious to Mr. *Kynaston*, was as plain; because he had been thereby deprived of an office which was his freehold. But, in case the Mayor *de facto* had authority to preside at an assembly for the amotion of officers; yet that this assembly was not regularly convened: For it was not held on any day appointed by the charter, or by usage; and therefore in such case, all the members who constituted

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J. Strange.  
N. Fazaker-  
ly.



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constituted the assembly, ought to have had due notice of it, according to reason and the usage of the place; for otherwise, corporate acts might be done by the majority of such members as were assembled, not only against the interest, but even against the sentiments of the corporate body; and if one member could be omitted, or left unsummoned, so might others; and this would leave it in the power of a Mayor to have a meeting of his own friends only, and to do therein whatever he thought proper. In the present case, one of the Aldermen was not summoned, nor endeavoured to be summoned; and for any thing which appeared to the contrary, his single negative, or the exercise of his right to advise and debate, might have turned the majority in favour of Mr. *Kynaston*; and it would be of the most dangerous consequence, to permit the inferior officers to summon, or omit to summon, as they should think fit. The Mayor should not only give orders, but should see that those orders were obeyed; otherwise the neglect of the inferior officer, is the neglect of the Mayor.—But it is objected, that because some small damages were neglected to be found by the verdict, no judgment can be entered for the costs; and if no judgment for costs can be given, there can be no judgment at all. If, however, the defendant in error cannot, by reason of this omission, have any judgment for his costs, he must submit to the loss of them; but it was hoped, that he should not be precluded from having his judgment, because that was wholly founded upon the insufficiency of the facts returned in excuse by the corporation for their not restoring him; and upon which insufficiency, the Court of King's Bench had always awarded a peremptory *mandamus*.

JUDGMENT  
reversed.  
Jour. vol. 25.  
p. 68.

AFTER hearing counsel on this writ of error, and the Judges (who attended according to order) having delivered their unanimous opinion touching certain points of law to them proposed; \* it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, should be reversed: And it was further ORDERED, that the said Court should award a *venire facias de novo*, and proceed according to law; and that the record should be remitted.

\* These points do not appear upon the journal; but are stated in Sir *John Strange's* report of this case.



|                                               |             |             |          |
|-----------------------------------------------|-------------|-------------|----------|
| <i>Hugh Montgomery, Esq;</i>                  | Plaintiff   | } in Error. | Case 37. |
| <i>Charles Dempsey, Lessee of</i>             | } Defendant |             |          |
| <i>the Reverend Charles Dodd,</i><br>Clerk, — |             |             |          |

16th May, 1737.

ON the 3d of *March*, 1732, the said *Charles Dodd* was collated to the vicarage of the united parishes of *Drumlease* and *Kilarga*, in the county of *Leitrim*, by the Bishop of *Kilmore*, the patron; *William Hansard*, the former Vicar, being removed to other livings. On the 15th of the same month he was inducted, and on the 18th read his assent and consent.

Soon after his induction, Mr. *Dodd* found the glebe lands of the said united parishes in the possession of the plaintiff in error; and therefore, in *Trinity* term, 1733, he, by the said *Charles Dempsey* his lessee, brought his ejectment against *Montgomery* in the Court of Exchequer in *Ireland*, for recovery of the said glebe lands; to which he appeared, and pleaded the general issue, not guilty.

On the 4th of *August*, 1733, this ejectment came on to be tried at the Assizes, when the said *Charles Dempsey*, to shew the said *Charles Dodd*, his lessor, to be legal Incumbent of the said united parishes, proved his collation and induction, his reading his assent and consent; and that the lands, for which the ejectment was brought, were the glebe lands of the said parishes, and which were admitted so to be by the said *Hugh Montgomery* and his counsel; and the jury, after a very full hearing, brought in their verdict in favour of the said *Charles Dempsey*.

But the said *Hugh Montgomery's* counsel then insisted, that the said *Dempsey*, as lessee of the said *Charles Dodd*, to entitle him to recover the said glebe lands, must shew that the said *Charles Dodd*, his lessor, had taken the oaths and received the sacrament, as directed by an act made in *Ireland* in the second year of the reign of *Queen Ann*, entitled, *An act against the*  
 VOL. IV. 4 C further



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*further growth of popery*; and tho' *Dempsey* was prepared to shew, that the said *Charles Dodd* had taken the oaths and received the sacrament; yet the Court being of opinion, that the act only required persons in civil and military employments, and not persons in ecclesiastical offices, to qualify themselves, as thereby directed; that point was, at the request of *Montgomery's* counsel, saved to be spoken to before the Judges, upon their return to *Dublin*.

Accordingly the point so saved, being afterwards fully spoken to before the Judges by *Montgomery's* counsel, the same was over-ruled. Whereupon a bill of exceptions was tendered, setting forth, that upon the trial of the issue joined as aforesaid, the said *Charles Dempsey*, to maintain and prove the aforesaid issue, gave in evidence to the jury, that the town and lands of *Killany*, *Kinaragh*, *Coneghill* and *Geskenagh* were part and parcel of the glebe of the said parish churches of *Drumlease* and *Kilarga*; and that the Bishop of *Kilmore*, to whom the advowsons of the vicarage of the said churches belong, on the 3d of *March*, 1732, collated the said *Charles Dodd* to the said vicarage, which was then vacant; and that the said *Charles Dodd*, by virtue of the said collation, was inducted and put into possession of the said vicarage on the 15th of *March*, 1732, and that the said *Charles Dodd*, on Sunday the 18th of *March*, 1732, in both the said parish churches, before the congregations then and there assembled, read the declaration of his assent and consent, according to the form of the statute in that case made and provided. Upon which, the counsel for the said *Hugh Montgomery* upon the said trial, insisted for matter in law, that the said *Charles Dempsey*, upon the said trial, ought to have given in evidence to maintain his said issue, that the said *Charles Dodd*, his lessor, after his collation to the said vicarage, had taken the several oaths, and publicly made and repeated the declaration appointed or required to be taken, made and subscribed within the kingdom of *Ireland*, and that he had subscribed his name to the said oaths and declaration: And further insisted, that the said *Charles Dempsey*, to maintain the said issue, ought to have given in evidence upon the said trial, that the said *Charles Dodd* had received the sacrament of the Lord's Supper, according to the usage of the church of *Ireland*, in some public church upon a Sunday, immediately after divine service



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service and sermon, according to the statute in that case made and provided. — But notwithstanding which, the Judges declared to the jury, that the said *Charles Dempsey* was not obliged to give in evidence to the jury, that the said *Charles Dodd* had taken the oaths aforesaid, or made or repeated the declaration aforesaid, or subscribed his name to the said oaths and declaration, or that he had received the sacrament in manner and form aforesaid; and upon which the jury brought in their verdict for the said *Charles Dempsey*: And therefore, and because the Judges had not declared it for law to the jury, that the said *Hugh Montgomery* was not guilty of the trespass aforesaid, in the declaration aforesaid mentioned; and for that the matters in the said bill of exceptions mentioned, did not appear upon the record of the said verdict, the said *Hugh Montgomery* had put such his exceptions into writing.

By this bill of exceptions, the defendant in error was delayed near a whole year; but on arguing the same in the Court of Exchequer, in *Easter* term, 1734, judgment was given for the said *Charles Dempsey*: Whereupon the plaintiff in error, for further delay, brought his writ of error from the said judgment, returnable into the Exchequer Chamber; where, after another year's delay, the judgment was, in *Trinity* term, 1735, affirmed.

And now, as his last resource, Mr. *Montgomery* brought a writ of error in Parliament; in support whereof it was said, that by an act passed in *Ireland*, 2<sup>o</sup> *Eliz.* it was, *inter alia*, enacted, that all and every person and persons, that at any time thereafter should be preferred, promoted or collated to any archbishoprick, bishoprick, or to any other spiritual or ecclesiastical benefice, promotion, dignity, office, or ministry in that kingdom, before he or they should take upon him or them to receive, use, exercise, supply, or occupy any such archbishoprick, bishoprick, promotion, dignity, ministry, office, or service, should make, take and receive the oath of supremacy, which is therein set forth, before such person as should have authority to admit any such person to such office, ministry, or service; or else before such person or persons, as by her Majesty, her heirs and successors, by commission under the Great Seal of *England*, or *Ireland*, or by the Lord Deputy, or other governor

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governor or governors of *Ireland*, by letters patent to be made by his or their warrant under the Great Seal of that kingdom, should be named, assigned, or appointed to minister the said oath. That by an act of Parliament made in *England*, 3<sup>o</sup> *William* and *Mary*, it was enacted, that so much of the said former act, as related only to the taking of the said oath of supremacy, should be repealed; and that instead of the said oath, all persons that should, after the 1<sup>st</sup> day of *March* then next ensuing, be admitted into any office or employment, ecclesiastical or civil, or come into any capacity, in respect or by reason whereof, they should have been obliged to take the said abrogated oath in the said former act mentioned, should take the oaths and make and subscribe the declaration by this act appointed, in such manner, at such times, and before such persons, as they should or ought to have taken the said former oath, by virtue of the said former act, as if the same had not been abrogated as aforesaid. — That it was therefore incumbent upon the said *Charles Dodd*, the lessor of the plaintiff, to have first taken the said oaths and subscribed the said declaration, as a previous condition, and a necessary qualification; without which, he could have no right or title to the said glebe lands, or any power to demise the same; and the plaintiff ought to have proved upon the trial, that his lessor had taken the oaths and subscribed the declaration, as by law required. For it would be a precedent of the most dangerous tendency in *Ireland*, if, by any other construction than what the express words of these statutes plainly import, ecclesiastical persons should, upon their respective promotions, be dispensed with, or exempted from giving the aforesaid test and necessary assurances of their fidelity and allegiance to his Majesty and his government: And the mischief would be equally great, if they should not be obliged to prove their having done so; it being a matter resting entirely within their own knowledge, and what those who contest their right to the possession of their livings, are ignorant of; and therefore, the proof of the want of such necessary qualifications; ought not to be thrown upon them. For all which reasons it was hoped, that the judgments in *Ireland* would be reversed; and that judgment would be given for the said *Hugh Montgomery*, with costs.



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For the defendant in error it was said, that there could be no doubt, but that the lands in question were the glebe lands belonging to the vicarage, and that they did not belong to the plaintiff in error : There was likewise no question, but that the Bishop of *Kilmore* was patron of the vicarage ; that as such, he presented Mr. *Dodd* thereto, and that the same was then vacant : Nor was there any dispute touching *Dodd's* being duly collated to, and inducted into this living ; that he duly read his assent and consent, and that he was still in possession, and officiated as vicar thereof. The single point saved at the trial was, whether a clergyman's living is an office civil or military, within the act 2<sup>o</sup> *Ann*, against the further growth of popery ? Or, if it was, whether the plaintiff was obliged, upon the trial, to shew that his lessor had taken the oaths and received the sacrament, according to the directions of that statute ?

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As to the first part of this question, it was insisted, that a clergyman's living is not an office civil or military, within this statute ; for tho' the station of a clergyman may, in contradistinction to a military employment, be called a civil one ; yet his living could not be comprehended within the meaning of the act, so as to be called a civil office ; for no *spiritual* promotion can be comprehended within the words *civil* or *military* ; and if it had been meant to have included spiritual promotions within this act, they would have been expressly mentioned in it, as they are in several other statutes, which comprehend offices ecclesiastical, civil and military. The civil magistrate was not intended to include the ecclesiastical office ; but the offices intended by the statute are such, as immediately flow from the grant of the Crown, and are public trusts for the advancement of justice and defence of the realm, and not spiritual promotions. — And as to the second part of the question, it was apprehended, that even if ecclesiastical promotions had been included in this act, yet the defendant in error was under no necessity, upon the trial of the ejectment, to have proved that his lessor had complied with the directions of the act ; because the lease, on which this ejectment was brought, was made the 9th of *April*, 1733, within less than a month after induction, which was on the 15th of *March* preceding, and this induction was the act which gave the lessor a right to the



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glebe; whereas the statute gave him three months after induction, to take the oaths and receive the sacrament. Besides, the only issue before the jury was, whether *Charles Dodd*, at the time of making the lease, could give the lessee such a right, as would entitle him to enter; for if his right of entry was then good, no subsequent act or neglect of his lessor could hinder him from recovering: The defendant, however, was ready to have proved his lessor's having taken the oaths and received the sacrament; but the Court would not permit him to do it, as being unnecessary.

But the counsel for the plaintiff in error, finding that the statute 2<sup>o</sup> *Ann* (which was the only one insisted on at the trial, and upon the argument in the Court of Exchequer, and particularly mentioned in the bill of exceptions) would not serve their purpose; did, in the Exchequer Chamber insist, that by the statute 3 and 4 *William* and *Mary*, Mr. *Dodd* must have taken the oaths before he could receive, use or exercise his promotion. — This, however, was a question never made before the Court which first tried the cause, and therefore ought not to be made afterwards; besides, by this statute, the oath of supremacy mentioned in the statute 1<sup>o</sup> *Eliz.* is abolished, and other oaths are therein substituted in the room of that; and in fact the defendant, in making out the title of Mr. *Dodd* his lessor upon the trial, did shew, under the hand and seal of the Bishop of the diocese, that he had taken the oaths pursuant to this statute of *William* and *Mary*; and those instruments were given in evidence upon the trial, and were perused by *Montgomery's* counsel. But upon the argument in the Exchequer Chamber, the Lord Chancellor and Chief Justices were of opinion, that on the bill of exceptions no statute could be insisted upon but that of 2<sup>o</sup> *Ann*, it being the only statute therein mentioned, upon which there was but one single point to be considered; and that the words of the bill of exceptions, “that  
“ the said *Charles Dodd*, *post collationem*, should have taken the  
“ oaths,” could not mean or intend the statute of 3 and 4 *William* and *Mary*, which being grounded on the statute 1<sup>o</sup> *Eliz.* requires the oaths to be taken before collation; and that even in this statute of *William* and *Mary*, there is no mention made of any penalties, disabilities or forfeitures, upon the neglect of  
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taking the oaths thereby prescribed. It was therefore hoped, that the judgment would be affirmed, with exemplary costs.

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AFTER hearing counsel on this writ of error, and the exceptions stated in the bill of exceptions appearing to be grounded on the act of parliament made in *Ireland* in the second year of the reign of *Queen Ann*, entitled, "An act against the further growth of popery:" It was ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, should be affirmed; and that the transcript of the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House: And it was further ORDERED, that the plaintiff in error should pay to the defendant in error, 200*l.* for his costs sustained, by reason of the bringing the said writ of error.

JUDGMENTS affirmed. Jour. vol. 25, p. 119.

The Governor and Company of the } Appellants. Case 38.  
Bank of *England*, and Others,

*Katherine Morice*, Widow, and Others, Respondents.

24th May, 1737.

*J. C. Melan. Mps. Rep. Vol. 1. p. 49.*

**HUMPHRY** *Morice*, the respondent's husband, for many years before his death, carried on a very extensive trade as a merchant, to the coast of *Africa* and all the *British* plantations in *America*, and also to *Holland*, *Russia* and the *East Indies*, and other places.

Forrester 217.  
3 Wms. 402.  
note.  
Viner, vol. 19.  
p. 326. ca. 6.

On the 16th of *November*, 1731, the said *Humphry Morice* died, having made his will, and appointed the respondent *Katherine Morice*, his widow, sole executrix thereof, who, soon after his death, proved the same.

Mr. *Morice*, at his death, left effects of great value in *Jamaica*, and other parts of the *West Indies* and places abroad to which he traded, and many ships on the sea bound for *Africa* and



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and the *West Indies*, with rich cargoes; and also a real and very considerable personal estate, particularly 3000*l.* bank stock; but notwithstanding this large estate, he left so many debts due to creditors in *England*, besides such as were due to his creditors abroad, that all his estate and effects in *England*, and those which there were any hopes of recovering from abroad, proved deficient to satisfy his debts.

For Mr. *Morice*, as afterwards appeared, was, at his death, indebted in 16,000*l.* upon specialties in *England*, and in upwards of 130,000*l.* on simple contract; and amongst his simple contract debts, there was due from him on the 15th of *December*, 1731, to the respondents *Ann*, *Judith* and *Elizabeth*, his three daughters by his first wife, being trust money of theirs in his hands, for principal and interest, 27,376*l.* 11*s.* 9*d.* — There was also due to the respondents *Sir Thomas Lee's* children, for principal and interest to the same time, 9376*l.* 8*s.* 9*d.* — To the respondent *Ann Sandes*, for principal and interest, 4648*l.* 6*s.* 9*d.* — And to the respondents *John Claxton* and his wife and son, for principal and interest, 16,767*l.* 3*s.* amounting together to 58,168*l.* 10*s.* 3*d.* the principal of all which sums were trust monies of the said several respondents in his hands.

Mr. *Morice* was likewise indebted to the respondent *Ann Colemore*, on account of trust stocks and monies of hers with which he had been entrusted, in 500*l.* *East India* stock, 864*l.* 9*s.* 8*d.* *South-sea* stock, 319*l.* 13*s.* *South-sea* annuity stock, 104*l.* 10*s.* 2*d.* paid him in cash, and in 16*l.* 1*s.* 7*d.* dividends received by him, and unaccounted for at his decease. — The appellants the bank of *England* also claimed a debt due to them by simple contract, of 29,000*l.* and upwards. — Mr. *Morice* was further indebted by simple contract, to the appellant *James Henckell* in 2089*l.* 5*s.* — To *Mary Glover* and *Henry Voght* in 1440*l.* — To *William Snelgrave*, for principal and interest, 1948*l.* — To *James Pearce*, for principal and interest, 2115*l.* — To *Jeremiah Pearce*, for principal and interest, 935*l.* 16*s.* — To *John Dagg* 1015*l.* 18*s.* — To *Joseph Grove* 4103*l.* 6*s.* 5*d.* amounting together to 13,647*l.* 5*s.* 5*d.* — To the appellants *Theodosia Crowley* and *Joseph Gascoigne Nightingale* by simple contract, in 1507*l.* 0*s.* 5*d.* — To the appellants *Ben-*  
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*jamin Weale, Lawrence Victorin* and several others in several sums of money, amounting together to 6682*l.* 17*s.* 8*d.* — To the other respondents in several considerable sums of money, and also to several others, who were no parties to any suit hitherto commenced, either in law or equity.

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Mr. *Morice* being thus indebted, and his creditors, upon his death, finding how greatly his debts exceeded his effects, they all of them (as it was natural for them to do) considered of the most effectual and expeditious means to secure themselves; and accordingly, bills in equity and actions at law to a great number, were brought against the respondent *Katherine Morice*, the testator's executrix.

The first of those suits was a bill filed on the 15th of *December*, 1731, by the respondents *Ann, Judith* and *Elizabeth Morice*, the testator's said three daughters by his first wife, *Sir Thomas Lee* and his children *Thomas, William* and *Ann Lee, John Claxton*, Esq; and *Sarah* his wife, and *Brown Claxton*, Esq; and *Ann Sandes*, widow, against the respondent *Katherine*, as executrix of her said late husband; setting forth, amongst other things,—That *John Brown*, merchant, by his will, dated the 4th of *October*, 1720, gave to the said *Humphry Morice* 16,500*l.* in trust for his five daughters, (of whom the said *Ann, Judith* and *Elizabeth* were the only survivors) to be paid in manner in the bill stated; and 5000*l.* in trust for the *Claxton's*, as therein mentioned; and 10,000*l.* in trust for the *Lee's* as therein mentioned; and gave to the said *Ann Sandes* 3000*l.* and after some other legacies, made Mr. *Morice* residuary legatee and sole executor of his said will: The bill then stated what had been paid off in part, and what remained due to the several parties; and that no part of the trust money due to his daughters had been paid, but that Mr. *Morice* had duly paid the interest of the other remaining trust money as it became due, to the time of his death; and having in their said bill specified the particular sums which were due to each of them respectively from the testator at his death for principal and interest, and from thence to the time of filing their said bill, amounting in the whole to the said sum of 58,168*l.* 10*s.* 3*d.* they prayed a decree for payment of the same.



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To this bill the respondent *Katherine* put in her answer, and stated what appeared upon inspection of her husband's accounts and papers, and set forth a copy of such of them as were required; and further disclosed the uncertainty of her testator's assets, and the true account of his debts by specialty and simple contract then come to her knowledge; and said she could not admit assets to answer the plaintiff's demands, but was willing to administer her testator's estate in a due course of administration, as far as his assets would extend, and submitted the whole to the judgment of the Court.

On the 25th of *January*, 1731, this cause was heard before his Honour the Master of the Rolls, upon bill and answer only; when it was, amongst other things, decreed, that the respondent *Katherine* should, out of the assets of her said husband, pay the said several sums demanded by the plaintiff's bill, in a course of administration; and for that purpose, that she should account for the personal estate of her late husband, which had or should come to her hands, and that subsequent interest should be carried on for the several principal sums mentioned in the decree, from the time of filing the bill, till the said accounts should be taken; and for the taking whereof all proper directions were given.

This decree was afterwards inrolled, and the respondent *Katherine* served with a writ of execution of it; and having then got in more effects of the testator's than were sufficient to pay off the specialties, she did, in obedience to, and in part performance of the said decree, pay out of her husband's assets 10,111*l.* to the said *Ann* and *Judith Morice*, who were then of age, in satisfaction of part of what was so decreed to be due to them.

On the 16th of *December*, 1731, the respondent *Ann Colemore*, wife of *Thomas Colemore*, by her next friend, exhibited her bill against the respondent *Katherine*, as executrix of her late husband; setting forth, amongst other things, that several quantities of *South-sea* stock, *South-sea* annuities and *East-India* stock were transferred, and several sums of money paid to the said *Humphry Morice*, in trust for her separate use, and upon such trusts as therein mentioned, exclusive of her said husband; and that a great part thereof



thereof remained due, viz. 862*l.* 3*s.* 6*d.* *South-sea* stock, 319*l.* 13*s.* *South-sea* annuities, 500*l.* *East-India* stock, 16*l.* 1*s.* 7*d.* due for dividends thereof, together with what other dividends were due thereon; and 104*l.* 10*s.* 2*d.* being money paid to the said *Humphry Morice*, as in the said bill specified, with interest; and therefore prayed, that the said several stocks, or so much thereof as remained in the name of the said *Humphry Morice*, in the books respectively belonging to the said Companies, might be transferred to trustees, with the dividends thereof, upon the several trusts in the bill specified: And as to so much as the said *Humphry Morice* had disposed of to his own proper use, that the respondent *Katherine* might be decreed, out of his assets, to make good the same with the dividends thereof; and might also pay the said sum of 104*l.* 10*s.* 2*d.* to trustees, to be appointed in manner in the bill mentioned; and might pay to the said *Ann Colemore*, the said 16*l.* 1*s.* 7*d.* and all dividends of the said stocks, and all interest on the said 104*l.* 10*s.* 2*d.* then or thereafter to become due to her.

To this bill likewise, the respondent *Katherine* put in her answer agreeable to the truth of the case, and submitted the whole to the direction of the Court.

On the 2d of *February*, 1731, this cause of *Colemore's* was heard before his Honour the Master of the Rolls, on bill and answer; when an account was decreed to be taken of what was due to the said *Ann Colemore* for the dividends of the stocks, and for the interest of the said 104*l.* 10*s.* 2*d.* which the respondent *Katherine* was to pay her out of the assets of the said *Humphry Morice*, in a due course of administration; and the respondent *Katherine* was in like manner, out of the said assets, to purchase 862*l.* 3*s.* 6*d.* *South-sea* stock, and 319*l.* 13*s.* *South-sea* annuities, and lay out 104*l.* 10*s.* 2*d.* in the purchase of *South-sea* annuities, and transfer the same to trustees to be approved of by the Master, for the benefit of the plaintiff *Ann Colemore*, upon the trusts therein specified: And the Master was to examine and certify, whether the said 500*l.* *East-India* stock remained in the said *Humphry Morice's* name unaltered at his death; and all further directions touching the same were reserved, till the Master should have made his report; and the respondent *Katherine* was likewise, in that cause, decreed to

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account for the personal estate of her said late husband, come to her hands; and several other directions were given touching the same.

The Master, in pursuance of this last decree, made his report, dated the 8th of *February*, 1731; and thereby certified, that the said 500*l.* *East-India* stock, remained in the said *Humphry Morice's* name unaltered at his decease; and that the half year's dividend due thereon at *Christmas* then last, being 20*l.* was unreceived; and that he had taken an account of what was due to the said *Ann Colemore*, for the dividends of the several stocks mentioned in the decree at *Midsummer*, 1730, and since then become due; and also for the interest of the said 104*l.* 10*s.* 2*d.* which dividends and interest amounted in the whole to 47*l.* 7*s.* 6*d.*

On the 9th of the same month, this cause came on again to be heard upon the Master's report; when the Court decreed the respondent *Katherine* to transfer the said 500*l.* *East-India* stock, to trustees for the said *Ann Colemore*, to be approved of by the Master; and that the respondent *Katherine* should pay her the said 47*l.* 7*s.* 6*d.* and also the said half year's dividend, out of the testator's affets, in a course of administration.

The Master, by a subsequent report of the 26th of *February*, 1731, approved of the respondents *Stephen Ram* and *Isaac Milner*, to be trustees for the said *Ann Colemore*. And the decree, orders and reports in *Colemore's* cause, being duly inrolled, the respondent *Katherine*, in obedience thereto, on the 27th of *April*, 1731, transferred the said 500*l.* *East-India* stock to the said *Ram* and *Milner*, and paid the said *Ann Colemore* the dividend due at *Michaelmas* then last, and also the said 47*l.* 7*s.* 6*d.*

On the 28th of *December*, 1731, the appellants, the Governor and Company of the Bank of *England*, sued out a special *latitat* from the Court of King's Bench, against the respondent *Katherine*, returnable the 24th of *January* then next, being the first day of *Hilary* term, for recovery of their demands out of Mr. *Morice's* affets; which was served upon Mrs. *Morice* on the 30th of the same *December*. And on the 15th of *January* following, *William Snelgrave*, *James Pearce* and *John Dagg*, three other  
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of the appellants, and *Jeremiah Pearce* since deceased, and represented by the appellant *James Pearce*, and who were all simple contract creditors, severally sued out *capias*'s by original, in the Court of King's Bench; each of them tested the 29th of *November*, 1731, and returnable the first return of *Hilary* term then next, against the respondent *Katherine*, for satisfaction of their debts: All which writs were served upon her attorney, on the 19th of the same *January*; who agreed to accept the same as good service upon the respondent *Katherine*, and undertook to appear thereto. — On the 18th of the same month of *January*, the appellant *James Henckell* sued out a common *capias* in the Court of Common Pleas, against the respondent *Katherine*, tested the same 29th of *November*, 1731, and returnable the first return of the then next *Hilary* term, for recovery of his debt; which was served upon her on the same day: And in *Hilary* term, 1731, *Joseph Grove*, since deceased, and represented by the appellant *Elizabeth Grove*, and the appellants *Glover* and *Voght*, and the other appellants *Crowley* and *Nightingale*, sued out their writs, against the respondent *Katherine*, returnable at some of the returns in that term, which were never formally served upon her; but on being acquainted therewith, she ordered her attorney to file common bail.

In the same term, the appellants *Weal*, *Victorin*, *Hayford*, *John* and *Bearcroft Berdoe*, *Greaves*, *Hardwell*, *Rutland*, *Godfrey*, *North*, *John Fell* the elder, and *John Fell* the younger, with several other creditors, filed their bill in Chancery, against the respondent *Katherine*; for satisfaction of their demands out of her testator's assets, and to subject his real estate to the payment of his debts, according to the directions of his will. So that, by the first term after her husband's death, she had suits commenced against her in law and equity, to the amount of 100,000*l*.

Mrs. *Morice* appeared to all these actions, and also to several other actions which had been brought against her by others of the creditors, upon the return of the several writs; and declarations having been delivered, and rules to plead given, she was under very great difficulties how to plead to these actions, so as to prevent any hazard of being charged out of her own estate;



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the decrees obtained against her not being pleadable at law. She was therefore advised, as the most safe way, to plead to all the several actions, by way of special *plene administravit*, that there were such and such specialties; and that she had not in her hands, at the time of the several actions brought, assets beyond 1000*l.* and immediately to file her bill in Chancery, stating the whole circumstances of her case; and praying the directions, indemnity and protection of that Court.

This plea running to a very great length, being above 250 sheets of paper, and it being necessary to put in the same plea to every one of the actions, it was impossible for the respondent *Katherine* to get these pleas ready prepared and ingrossed, in order to be delivered within the time limited by the common rules of the Court, which is but four days after the declaration delivered; and therefore, on the 27th of *January*, 1731, she moved the Court of Common Pleas, in the action wherein the appellant *Henckell* was plaintiff, for enlarging the time to plead, upon an affidavit, stating the number of actions, and that her testator's affairs were, on his death, found involved in the greatest disorder and confusion, insomuch that she had not been able to settle or reduce the same to any certainty, either as to his debts, or the natures and kinds thereof, or what the amount of his effects would be; and that there had already appeared debts to greatly more than 100,000*l.* which his assets then come to her hands would fall short of. And upon this motion, the Court gave her a week's time to plead. And in the several other actions, wherein the appellants *Snelgrave*, *James Pearce* and *John Dagg*, and the said *Jeremiah Pearce*, were plaintiffs, the respondent *Katherine* had the like time given her to plead, as in *Henckell's* action; but she was to plead issuably, and accept notice of trial in that term: And in two other of the actions, wherein the Governor and Company of the Bank of *England* and *Thomas Grosse* were plaintiffs, the respondent likewise had time to plead on the same terms; but in these two last mentioned actions, she was, by consent, not to confess judgment in that or any other Court, for any demand of the same or the like kind, with the plaintiffs in those actions.

On the 6th of *February*, 1731, the respondent *Katherine* pleaded to all the said several actions, bonds and specialties  
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owing by her testator, to the amount of 15,000*l.* and that she had only 1000*l.* assets to pay: And upon this plea, the plaintiffs in the said actions, except the Bank, took judgment out of assets, when they should come to her hands; and all the appellants who took such judgments, signed their interlocutory judgments, as of *Hilary* term, 1731, except *Crowley* and *Nightingale*, who did not sign their judgments till *Trinity* term, 1732, and *White* and *Massey*, who did not sign their judgments till *Hilary* term, 1733.

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The appellant *Henckell*, on the 7th of *February*, 1731, took judgment of assets *quando acciderint*, which was then signed and entered up; and the 9th of the same month, a writ of inquiry of damages was executed, upon which the jury found 2089*l.* 5*s.* damages and costs; and on the 16th, judgment was given for the appellant *Henckell* for 2135*l.* for damages and costs; which judgment was signed and entered the same day.

All the other appellants, except the Bank, took the like judgments out of the assets *de futuro*; and Mrs. *Morice*, at their request, and after *Henckell's* having executed his said writ of inquiry, viz. on the 11th of *February*, 1731, to save the estate the expence of executing writs of inquiry, and on an agreement, that matters should stand in all respects the same as if a writ of inquiry had been executed, and that the said other appellants should be in the same condition as *Henckell*; confessed damages to the said other appellants. But none of the appellants, except *Henckell*, signed their judgments of assets *quando acciderint*, till after the 18th of *April*, 1732, except *Glover* and *Voght*; and they did not sign theirs till the 8th of *March*, 1731.

The Bank refusing to take judgment of assets *quando acciderint*, replied to Mrs. *Morice's* plea, and went to trial; and by that means, their judgment was last of all, being of *Hilary* term, 1735.

The cause in Chancery, wherein *Weale* and others were plaintiffs, was heard on the 24th of *July*, 1734; when Mr. *Morice's* real estate was declared to be well subjected to his debts, by his will: And it was referred to the Master, to take an account



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account of the demands of the plaintiffs in that cause; and an account was decreed of the testator's personal assets, and of the rents and profits of his real estate; and in case of a deficiency, his real estate was directed to be sold for payment of his debts; and the respondent *Katherine* was ordered to administer the assets in a course of administration; and all usual directions were given for taking the said accounts.

On the 8th of *February*, 1731, the respondent *Katherine* exhibited her bill in the Court of Chancery, against the several creditors by decrees and judgments, stating the several matters already mentioned; and praying, that all proceedings at law against her might be stayed by injunction, and for a discovery of the reality of the said creditors demands; and that an account of her testator's assets might be taken, under the directions of the Court, and that the same might be administered, as far as they would extend in a due course of administration; regard being had to the nature and superiority of the creditors demands, and that she might be protected and indemnified in paying a due obedience to the said decrees; and likewise praying, that the Bank might admit her to transfer and dispose of the said 3000*l.* Bank-stock of her testator's, which stood in his name, and which they had refused to let her transfer, and for general relief. — And, on the 7th of *May*, 1734, the respondent *Katherine* filed her bill of revivor and supplemental bill, in order to revive the said suit against the representatives of the parties who had died after filing her original bill; and by way of supplement, stated the second decree upon the Master's report, in *Colemore's* cause, and the subsequent report in pursuance of that decree, and the obedience she had paid thereto, as before stated; and also the subsequent proceedings on the said actions at law, which had been had since the filing her original bill.

To this bill, the several defendants put in their respective answers; and all the appellants, by their answers, thought proper to insist, that the said two decrees were fraudulent, and obtained by collusion; and therefore the appellants, the judgment creditors, insisted they ought not to be restrained from proceeding at law, for recovery of their respective demands against the respondent *Katherine*; and that she had brought these difficulties upon herself, and that there was no foundation  
for



for a Court of Equity to interpose to the prejudice of those who had obtained judgments at law; and were equally fair and honest creditors with those to whom, as they alledged, the respondent *Katherine* had contrived to give an undue preference; and they also insisted, that their judgments ought to be preferred to the said two decrees, and be first satisfied out of the testator's assets, in regard a decree in a Court of Equity, was not equal to a judgment at law. — The appellants, *Benjamin Weale*, and his co-appellants, insisted on a distribution of the testator's assets equally amongst all the creditors, who were of equal degree at the testator's death, as far as the same would go.

The Bank, by their answer, further insisted to retain the 3000*l.* Bank-stock, that stood in the name of the said *Humphry Morice* at his death, towards satisfaction of their debt. — And the respondents, the creditors under the two first decrees, insisted, that they were fairly obtained, and denied all fraud and collusion, and that the several demands thereby established were just; and that the said decrees, being prior to any other decree, or judgment, obtained against the respondent *Katherine*, (except a judgment obtained by one *Mr. Maynard*, in the justice of which all parties acquiesced); their demands under those decrees, ought to be paid prior to any of the appellants demands.

The respondent *Katherine*, pursuant to several orders made in her cause, paid into the Bank the sums due to the several creditors who had obtained judgments against her, amounting to 14,784*l.* 5*s.* 3*d.* Whereupon, the injunction which had been before granted, was continued till the hearing of the cause; but the plaintiffs in those actions were to be at liberty to proceed on their judgments, so far as to make the respondent *Katherine* personally liable in point of law; but not to take out execution, without leave of the Court of Chancery. And accordingly, all the judgment creditors got *devastavit*s returned against the respondent *Katherine*; she not being able to justify herself at law under the said several decrees.

Witnesses having been examined, and publication passed in the respondent *Katherine*'s cause; the same came on to be heard before his Honour the Master of the Rolls, on the 1st of *August*,



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1735; who, after a hearing of six days, decreed, that the judgment creditors, and the rest of the creditors of the said *Humphry Morice*, should be enjoined from proceeding at law against the respondent *Katherine*, for so much of his assets as was recovered by the decrees of the 25th of *January*, and the 2d and 9th of *February*, 1731; and the defendants, the Bank of *England*, were also ordered to permit the respondent *Katherine* to transfer the 3000*l.* Bank stock, standing in the name of the said *Humphry Morice*, which was to be considered as his assets; and several directions were given for carrying this decree into execution.

But all the present appellants appealed from this decree to the Lord Chancellor *Talbot*; and the cause coming on to be heard on such appeal, his Lordship, on the 6th of *November*, 1736, after a most deliberate hearing of seven days continuance, ordered and decreed, that it should be referred to the Master to take an account of what was due to the several creditors of the said *Humphry Morice* by decrees and judgments, on their said decrees and judgments; and also of what was due to the other creditors of the said *Humphry Morice*, who had not obtained decrees or judgments; but in taking the account of what was due to the respondents *Ann* and *Judith Morice*, under the decree of the 25th of *January*, 1731; the Master was to enquire what was reasonable to be allowed to their father the said *Humphry Morice*, for their maintenance, from the time they respectively attained the age of 21, till the time of his death, and to deduct the same out of what should be found due to them: And the Master was also to take an account of the personal estate of the said *Humphry Morice*, which had come to the hands of the respondent *Katherine*, or any other for her use; and the same, together with what should be received by her, or any other person for her use, was decreed to be applied, in the first place, to pay what should be found due to the several plaintiffs, under the said decree of the 25th of *January*, 1731; and then to pay what should be found due to the plaintiffs under the decrees of the 2d and 9th of *February*, 1731, according to those decrees; and his Lordship declared, that the 500*l.* *East-India* stock, mentioned in the said decrees of the 2d and 9th of *February*, 1731, and the dividends received for the same since the death of the said *Humphry Morice*, ought not to be considered



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sidered as any part of his assets, he being only a trustee thereof: And it was further ordered, that after payment of what should be found due on the said decrees, the residue of the said testator's assets should be applied in payment of the several judgments, and of what was due on the decree in the cause, wherein the said *Weale* and others were plaintiffs, according to their respective priorities; and if any thing should remain, then in payment of the other creditors of the said *Humphry Morice*, in a course of administration; and the defendants, the Bank of *England*, were decreed to permit the respondent *Katherine* to transfer the 3000*l.* Bank-stock standing in their books in her testator's name, which was to be considered as his assets, and the dividends thereof due and to grow due, were to be laid out in *South-sea* annuities in the name of the Accountant-general, subject to further order; and it was ordered, that the money which had been paid into the Bank by the said respondent, should be laid out in *South-sea* annuities in the name of the Accountant-general, subject to further order; and the several defendants who had obtained judgments at law, or who had not as yet obtained any judgment or decree, were enjoined from proceeding at law against the respondent *Katherine*, for recovery of the debts to them respectively due from the said *Humphry Morice*; and all parties were at liberty to apply to the Court for further directions, and were to be paid their costs, to be taxed by the Master, out of the testator's personal estate.

From this decree, four several appeals were brought: The first by the Governor and Company of the Bank of *England*; who insisted, that their demands were before, and at the death of *Humphry Morice*, legal demands, and recoverable by the ordinary proceedings in the courts of law. That they accordingly pursued such legal method, and obtained a verdict and judgment against the respondent *Katherine* for 28,993*l.* 8*s.* 1*d.* and not having, by any act of theirs, forfeited or abused their legal remedy, they ought not to be restrained by a Court of Equity from taking out execution on the said judgment, when it manifestly appeared, that the decrees of the 25th of *January* and 2d of *February*, 1731, were obtained by the assistance of and in collusion with the respondent *Katherine*; who immediately came into a Court of Equity, in order to be protected for

J. Strange.

J. Pauncefort.

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so doing. That by this decree of the 6th of *November*, 1736, the appellants were not only restrained from going on at law, but must also wait for satisfaction until all the several accounts thereby directed were fully settled, which, in the present case, there was very little prospect would ever be done; nor was there any prospect of there being any thing remaining for the judgment creditors, after the decree creditors were satisfied their principal and interest. And should it once be established as a rule in a Court of Equity (which it was apprehended was never till now attempted) that a voluntary decree, submitted to by an executor in favour of some of the creditors of the testator, should be a sufficient ground to draw all the other creditors into equity, and prevent their going to law; the plain and natural consequence would be, that such other creditors could never be sure of obtaining satisfaction for their demands in a legal way; but would be in danger of being involved in tedious and expensive suits, as the appellants had been in the present case. And for this reason, bills filed by executors to have the assets brought into and distributed by a Court of Equity, have been discountenanced; tho' not done with a design to favour any of the creditors, or prefer them to the others. That the decrees of the 25th of *January* and 2d of *February*, 1731, were submitted to by the respondent *Katherine*, with an apparent intent to apply all the assets in satisfying the plaintiffs in those suits, to the entire exclusion of the rest of the testator's creditors. But it was conceived, that a Court of Equity ought not to give any assistance or protection to the respondent *Katherine*, contrary to that known maxim, that *equality is equity*; much less did she merit such assistance, having, by her answers in those suits, admitted more money to be due than really was so; and having put in a false plea to the appellants action at law, and also submitted to the decree of the 2d of *February*, 1731, after she had consented not to acknowledge any judgment in the Court of King's Bench, or any other Court, for a demand of the like kind with the appellants; as the demands of the decree creditors were, being all upon simple contract. That decrees in equity, especially those obtained only upon the admission of executors, and without any manner of proof, ought not to be esteemed equal to judgments obtained at law; and much less when such decrees were obtained for greater sums than



than were really due, as in the present case; and particularly as to the demands of the respondents *Ann, Judith and Elizabeth Morice*, which, by the decree of the 25th of *January*, 1731, were ascertained at 27,376*l.* 11*s.* 5*d.* which far exceeded the monies really due to them; and still less were the plaintiffs in that decree, entitled to interest at 5*l.* *per cent.* for the principal sums admitted by the respondent *Katherine* to be due to them, as it must swallow up all the testator's assets. That supposing (but not admitting) there was any foundation for an executrix, who finds judgments and decrees against her testator in his life-time, to come into a Court of Equity for directions in the application of his assets; yet an executrix, not left under that difficulty, but who had voluntarily brought it upon herself, was not equally the object of relief in a Court of Equity. That the judgment obtained by the appellants, ought to have been decreed to have been paid, not only before any of the demands of the respondents under the said voluntary decrees, but even before such of the respondents as had obtained judgment against the respondent *Katherine*; because the appellants judgment upon the falsification of her plea, attached upon all the assets received by her before the 6th of *February*, 1731. Whereas the judgments of assets *in futuro*, taken against her by the other respondents, could only affect the assets which she received after that time. That the 3000*l.* Bank-stock, for which *Humphry Morice* had credit in the appellant's books at the time of his death, and the dividends due thereon, was the only security which the appellants had for their demands, amounting to 28,993*l.* 8*s.* 1*d.* and therefore it seemed contrary to equity to take from them that security, till their demands were satisfied.

As to the objection, that the respondent *Katherine* could not at law plead the two decrees obtained against her, and that therefore it was highly reasonable she should be protected in a Court of Equity in paying obedience to such decrees; which she could not, if she was obliged at law to ratify the demands of the appellants and the other judgment creditors: It was answered, that those two decrees were obtained with her privity and consent; that she put in her answer to both the bills, without being served with any subpoena to appear; and that she consented to the hearing of both those causes, without being served



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with a subpoena to hear judgment: And if she afterwards met with any difficulties in the disposal of her husband's assets, they were brought upon her by her own voluntary act only; and the creditors at law ought not to suffer on her account.

And as to another objection, that executors at law have a right to prefer one creditor before another, by giving judgment to one creditor, and pleading that judgment at law against another creditor; and that there is the same reason, that an executor may submit to a decree in equity, and thereby prefer a creditor, as that an executor may give the like preference by confessing a judgment: It may be answered, that altho' confessing judgment has been allowed at law, yet it never was countenanced in a Court of Equity; and the reason why an executor has that liberty at law, is in order to defend himself against other actions which might be brought against him, where the assets are not sufficient to pay all the creditors: And therefore, if an executor is sued by two creditors on simple contract, each for 100*l.* and has only 100*l.* assets; it is absolutely necessary for him to confess judgment to one, in order to plead that judgment against the other; because at law he cannot plead an action brought against him for a debt on simple contract, to another action for a debt of an equal nature: And for this reason only it is, that the law allows of an executor's confessing a judgment. But in the present case, the respondent *Katherine* submitted to the two decrees, with a view only to prefer them, and not by way of defence to the actions brought against her at law; because it was well known, that those decrees could not be pleaded at law; and upon that head of equity, her present bill was framed. Besides, if an executor is entitled to prefer a creditor, by submitting to a decree in his favour, the same rule ought to be observed as to decrees obtained upon the executor's admission of more money than is really due, as is observed at law upon confessing a judgment for a false debt. At law, if judgment is confessed, and afterwards pleaded to an action brought at the suit of another creditor, and upon a replication *per fraudem*, that the judgment was confessed for more money (tho' ever so small) than was really due; the executor, for his false plea, must satisfy the whole of such creditor's demand, whether he has assets or not. And in this case, the plea  
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of the executrix had been abundantly falsified by the verdict obtained by the appellants. That the appellants had always been willing to waive any advantage they might have by their verdict, in order to an equal distribution of the assets, between all the simple contract creditors, whether by judgment, decree, or otherwise; and were still willing to come into any measure for sharing the common calamity: But they conceived it to be very hard, that the relations of Mr. *Morice* should, by the assistance of the executrix, divide the whole assets, and receive their full principal, with interest, at 5*l. per cent.* which would still be running on during the whole progress of the account directed by the decree; it being evidently for the advantage of the decree creditors to obstruct and delay, as much as possible, the taking of such account, they being, in the mean time, to receive so high an interest as 5*l. per cent.* for their whole demands.

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The three other appeals were brought by different sets of judgment creditors; and in support of the second appeal it was contended, that all the assets of the testator were legal assets, in the distribution of which, the law has never considered decrees as equal to judgments. That the appellants having obtained a priority at law, and wanting no assistance from a Court of Equity, it seemed contrary to the fundamental principles of such a Court, to take the benefit of the law from those, who had in no respect acted against conscience; who had at least as much equity to be paid, as the other creditors could pretend to; and had besides the law on their side: And there was no precedent to be found, where such creditors have been enjoined from proceeding on their judgments, in favour of others who had obtained decrees; tho' the case must very frequently have happened. That such a precedent, if established, would put an end to the jurisdiction of the common law over legal assets, which was a very large branch of property, and draw the whole distribution of them into Courts of Equity; which would be so far from promoting justice and convenience, that it would expose the creditors of every testator or intestate, to great vexation in recovering their debts, and give every executor or administrator new means of partiality and fraud. For the whole account of assets must be taken in equity; no person can be paid till that is done, and the demands of all the creditors

J. Verney.

W. Murray.



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ditors adjusted; the whole costs of the litigation must come out of the estate, by which the assets will be considerably lessened; and where there are many creditors, the executor, in conjunction with any one of them, may avoid paying the rest, or coming to any distribution for several years, which it will always be his interest to do. That bills brought by executors or administrators, to bring in all the creditors to accept of an equal distribution, even before they have commenced any suit, have always been rejected; and yet, in the present case, the bill was brought to protect the executrix, in a preference she had given to some of the creditors, and to support an unequal distribution of the assets; which was productive of much greater hardship, and liable to much greater frauds, than bills to establish an equality. If a creditor by judgment obtains part of his satisfaction out of legal assets, Courts of Equity will not permit him to have any part of the equitable assets, without putting all the creditors upon an equal foot: But in this case, the creditor at law is restrained from taking any part of the legal assets, till the creditor, who sues in Equity, is paid the whole; which is inverting the rule of equality, and taking away the benefit of the law from the appellants, in order to give all the assets to the respondents. That as there was no precedent of the like kind, this was a very unfavourable case to make the first precedent in: For the executrix, in this case, lay under no difficulties, but what she had voluntarily brought herself into; it being apparent, that all the proceedings in equity were by consent, and in concert between her and the respondents, who sued her there; and that a scheme was contrived between them to give this preference, and to disappoint the appellants and the other creditors of their just debts; and that without her consent, it would have been impossible to have obtained decrees against her, which could have put her under any difficulty. That while she was carrying on this partial and collusive scheme, to exhaust all the assets in favour of a few, she delayed the appellants in their proceedings, and obtained time to plead, which would not have been granted, if this partial contrivance had been known: And if ever equity interposed in cases of this nature, it ought to be, where an executrix acts fairly and impartially, and desires to do equal justice to all; and not in a case contrived on purpose to prefer some favourite creditors, and strip the rest of their whole demands.

But



But it is objected, that an executor may, at law, prefer which creditor he pleases, by confessing a judgment to one, and pleading it to the demand of the other; and therefore, why may not the same preference be given in equity? — This is allowed at law, merely for the safety of the executor, that he may defend himself from being made liable to more judgments than he has assets to answer; but there is no instance where this legal privilege has been encouraged or aided in equity. At law there is some necessity for it, because the executrix can plead judgments only, and not any suits which are commenced in which judgments are not obtained, which may be insisted upon in equity; but Mrs. *Morice* purposely avoided it in this case, tho' she put in her answers after the appellants actions were commenced: And by permitting the legal privilege of making a preference, to be made use of in Courts of Equity, more frequent opportunities would be given to make unfair and unequal distributions of assets; at times too, when the same end could not be attained at law; and in cases, where there could be no necessity for it; which would be adding greatly to the hardship of creditors, who are already too much at the mercy of executors. If at law an executor confesses a judgment for more than is due, tho' for ever so small a sum, it is a *devastavit*; and he cannot protect himself, or cover the assets of his testator by a judgment so confessed. In the present case, the executrix had manifestly submitted to a decree for more than was due; for she ought to have craved an allowance for the maintenance of the respondents *Ann* and *Judith Morice*, after they attained 21; and if she had insisted upon this allowance, which the Court declared ought, in justice, to have been made, it must have been referred to a Master to take an account of what should be deducted for such maintenance; in which case, the respondents *Ann* and *Judith* could not have had a final decree, prior, in point of time, to the judgments obtained by these appellants; and therefore this priority was entirely owing to the executrix's fraudulently submitting to pay more than was due to them. If then this is to be compared to the case of preference at law, that rule of law ought strictly to prevail; and the decree being for more than was justly due, ought not to stand in the appellants way, but ought to be considered



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sidered as taking place only, from the time it was rectified by the Lord Chancellor.

But further; it was apprehended, that the executrix had, in many other particulars, submitted to pay more than was due; for, in the case of so deficient an estate, she ought to have insisted upon an allowance for the maintenance of the respondents *Ann, Judith and Elizabeth Morice*, from the death of *Mr. Brown*, under whose will they claimed the sums decreed to them, who died in 1720; and she ought not to have submitted to pay any interest for their legacies under his will; especially, not at the rate of 5*l. per cent.* from his death, to the time of pronouncing the decree; there being no proof, that her testator made interest of the money at that rate; and it being certain, that after his death she did not make such interest. Neither ought any interest to have been allowed subsequent to the decrees, and much less at the rate of 5*l. per cent.* for by these means, the parties who had obtained decrees, were gainers by a common calamity; and, during this long litigation, had got higher interest for their money, than they could have made any where else. The allowance of interest is discretionary in a Court of Equity, and it is scarce ever allowed in the case of a deficient estate; and if the executrix had disclosed her testator's affairs, and that she could not safely pay the money decreed, without bringing all the creditors before the Court, it was apprehended, the Court would not have decreed any subsequent interest; and especially, as the only argument by which the decree creditors claimed to be first paid, was by comparing decrees to judgments, and insisting that both ought to be put exactly upon the same footing; and yet judgments carry no interest from the times they are signed, tho' obtained for debts payable with interest. And while the other creditors lost above 100,000*l.* by which many of them were almost undone; it seemed very inequitable, that a few should not only receive their whole demands, but likewise be allowed interest at the rate of 5*l. per cent.* during a litigation of extraordinary length, and occasioned by a scheme concerted with the executrix, to prefer them in a way hitherto unattempted.

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On behalf of the third set of appellants it was argued, that the administration of assets by executors, is a known part of the common law; and that there was no instance where Courts of Equity have interposed to subvert that course and method of paying creditors, which the common law has established. But it was conceived, that the present decree complained of did subvert the legal method and course of administration, and countenanced executors, by collusive proceedings in equity, to give a preference to some favourite creditors, and to subject others, seeking remedy in that short and easy method which the law prescribes, to great and expensive delays and difficulties, without any act or default of their own. That there was apprehended to be no precedent, where a Court of Equity has interposed by decree, to enjoin a fair and honest creditor from proceeding at law against an executor, to recover his just debt: The law which makes executors liable, having in all cases, where the wisdom of the law has thought it just, provided for their defence; unless where by their own wilful default or negligence, they forfeit that defence and protection which the law affords them. That if the respondent Mrs. *Morice* was under any difficulties in her administration of the testator's assets, it did not arise so much from any defect in the law, as from her own hasty and precipitate proceedings in the causes in the Court of Chancery; which plainly appeared to have been calculated, to give an undue preference to some of her husband's relations and friends. That inconveniencies or difficulties, attending executors in the administration of assets, was no reason for the interposition of Courts of Equity, which tho' of high, yet are of limited authority; and there are many instances, where it has been thought proper for the Legislature to interpose, and several others yet remain, which a Court of Equity never did relieve against. That the decree of the 25th of *January*, 1731, to which a preference was given by the decree complained of, appeared even by that decree to be wrong; and was conceived to be so in particulars of greater consequence, than what were taken notice of by the present decree; and therefore it ought not to have had any aid from the Court, or to have been carried into execution by any new decree, till it had been set right by rehearing or appeal, according to the known practice of the Court; and as the present decree

J. Floyer.

H. Bankes.



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decree had reduced or varied the rights of the parties, which had been precisely settled by the former decree, it was apprehended, that two inconsistent decrees were now subsisting, touching those demands. That in the case of equitable assets, Courts of Equity always decree an equal distribution amongst the creditors, without regard to priority; and it was conceived, that to decree a priority upon legal assets, and in favour of those who had originally no lien in law upon those assets, as in the present case, was not only to innovate upon the law, but contrary to the known and allowed maxim in Courts of Equity, that *equality is equity*.

C. Clarke.  
W. Monk.

And in support of the fourth appeal, it was said, that at the testator's death, all the creditors stood in the same degree, as to their several demands upon his estate, not one of them having, at that time, any priority of claim upon the assets which he left; and as it was agreed on all hands, that his debts were near 100,000*l.* more than his effects would answer, it seemed highly reasonable, that the loss should fall equally on all the creditors, in proportion to their debts; and not that a few should receive their whole demands, and the rest lose the whole, which, according to the present decree, would be the case. That the ancient practice of Courts of Equity, was agreeable to what was now desired; and bills of conformity, as they were called, were allowed of, to compel creditors in cases of this kind, to conform all to one rule, and receive a rateable or proportionable satisfaction for their several debts, where the assets would not extend to make full satisfaction. That in the present unfortunate case, some of the appellants, on the 23d of *January*, 1731, and before any decree or judgment was obtained by any of the parties, filed a bill in the Court of Chancery on behalf of themselves and the rest of the creditors of *Morice*; praying, that they might all be paid in proportion, out of the assets, and that no one creditor, or set of creditors, might be preferred before the rest; but a demurrer was allowed to that bill, as improper; the practice of Courts of Equity not having of late years encouraged such bills. \* That Mrs. *Morice* the executrix,

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\* The reason for this alteration in practice, is given by Lord *Talbot* in his argument on this case. *Vide Forrester's Rep.* p. 224.



by her bill in this cause, fought to protect herself by the decree of a Court of Equity, in what she had done contrary to all rules of Equity; but this bill ought not to have been retained upon any other foundation, than in order to oblige her to conform to those rules: For an executrix, who sees and knows that the fund for the payment of the testator's debts will be very deficient, and therefore gives a preference to some creditors to receive their whole demands, by which means others must lose all their debts; seems to have no right to ask the aid of a Court of Equity, to protect her in such manifest partiality. It was therefore prayed by all the appellants, that the decree of the 6th of *November*, 1736, might be reversed; and that all the testator's creditors might be paid in proportion.

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To all this reasoning, it was answered on behalf of the respondent *Katherine Morice*, that a decree of a Court of Equity has always been considered as equal to a judgment, and if prior in point of time, is preferable in the course of payment; and as the executrix was bound to obey the decree, tho' at the same time she could not plead it at law in justification of her obedience, it was but justice that the Court of Equity should protect her, and support the authority of its own decrees. That the demands established by the decrees, were originally of equal degree, and of equal justice with any of the appellants demands; but the decree creditors having, by their diligence and priority of suit, raised the nature of their demands to a superior degree, the executrix was bound by the course of administration to give them a preference; and if a trust creditor, whose remedy lies only in equity, should not have the same advantage of his diligence of suit, and the priority of his decree, as a legal creditor would have from a prior judgment; or if the executor should not be equally protected in the payment of a prior decree, as of a prior judgment; either the equity creditor, or the executor, or both, must be inevitably ruined in all cases of a deficiency of assets.

D. Ryder.  
J. Browne.  
N. Fazaker-  
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But it is objected, that the decrees which give the priority, were obtained by collusion and undue preference; and that therefore, the executrix has no right in Equity, to be protected under those decrees: And, the instances of collusion and undue preference insisted on by the appellants, are, that the de-



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mands in those bills were fictitious; that the executrix answered the bills, without the compulsion of process; that the causes were heard upon bill and answer; and that the hearing was expeditiously brought on by consent.

In answer to this objection, and the particulars on which it was founded; the executrix insisted, 1st. That the reality and justice of the demands was established beyond all doubt and contradiction, nor did the appellants examine a single witness to disprove, or draw any suspicion on them. 2dly. That it is far from being any misbehaviour in an executor to answer the demand of an honest suitor, either at law or in equity, without the compulsion of process; and that the interval of time between filing the bills and the answers, being no less than about five weeks, shewed that there was room enough to have served the process of the Court in all its forms. 3dly. As to the hearing of the causes upon bill and answer, it was impossible for the executrix to avoid it; for the plaintiffs having particularly charged in their bills all the circumstances of their demands, and all the facts which were necessary to entitle them to a decree; and having interrogated the executrix in the strictest manner to her knowledge, information and belief thereof, she could not, without the guilt of perjury, avoid disclosing the whole truth of her knowledge, information and belief: And if from the facts she was so bound to disclose, the Court thought there was sufficient ground for a decree, there was no foundation for calling it a collusive one. Besides, the respondent had so strict a regard to truth, that the appellants had not been able to falsify her answer in the most minute circumstance; and as the law even allows an executor voluntarily to confess a judgment without the least imputation of fraud, where the debt is real and just; so this case was much more favourable, where the answer to the demand was solemnly put in upon oath, and the justice of it supported by incontestible proof. 4thly. That the circumstance of hearing the causes by consent, had no manner of influence upon the merits, nor was the executrix obliged by the rules of law or equity, to stand out the whole length of the process against suitors, especially the first of all the suitors, or to delay them to the last moment, in order only that the appellants themselves might gain that very preference which they complained of in the respondents; and the rather, as the executrix



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executrix had in every instance, consistent with her safety, avoided delay and litigation; for her pleas at law, though fourteen in number, and each plea containing 250 sheets, were put in within a third part of the time that was taken to put in her two answers; and, the damages were confessed, to save the trouble and expence of writs of inquiry; nor was there a single instance of an affected delay on her part, throughout the whole proceedings.

As to the other ground of objection, that equality is the favourite rule of a Court of Equity; and that the executrix ought never to be protected in inclining more to one set of creditors than another: It was answered, that this was an objection rather to the law, than the justice of the decree; for it is not in the power either of a Court of law or equity, to make an equality amongst creditors who have claims upon legal assets, which are a fund for the payment of demands in such order and degree as the law has prescribed; and a preference must of necessity be made amongst creditors, where the assets are not sufficient to pay all of them their full demands. That if the executrix had not in this case, transgressed the rules of law and equity concerning the administration of assets; it was hoped, she should not be punished out of her own estate, she being under an absolute necessity of giving a preference to some of the creditors, in exclusion of others; and the hardships now complained of, must, from the nature and necessity of the thing, either fall upon the present appellants, or on other creditors under circumstances at least equally favourable. And, as to the 3000*l.* Bank-stock, standing in the testator's name at the time of his death, it was apprehended, there was no manner of foundation for the Bank to retain the same towards satisfaction of their demands.

For the respondents the *Morice's* and the *Lee's*, who were creditors under the decree of the 25th of *January*, 1731, it was contended, that they had exhibited their bill against the executrix for the recovery of their respective demands, before any action or suit had been commenced by the appellants; and that they had obtained a decree, before any of the appellants had obtained any decree or judgment; and therefore, though the demands of the appellants and respondents were originally

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of an equal nature; yet the respondents, by such their legal diligence, had acquired a priority, and ought to be first satisfied: For, wherever the effects of a testator are (as in the present case they confessedly were) not only assets in a Court of Equity, but liable even at law to the payment of debts; in directing the administration of such assets, those creditors have always been ordered to be first satisfied, who obtained the first decree or judgment.

It is however objected, I. That the decree of the 25th of *January*, 1731, tho' antecedent to any other judgment or decree, was obtained by the collusion of the executrix, in appearing voluntarily not only to answer the bill, but afterwards to hear judgment in that cause. II. That this decree was obtained collusively, because it was founded only upon the admission of the executrix, without any other proof of the reality and justice of the respondents demands.

As to the first of these objections, it is observable, that the bill was filed on the 15th of *December*, 1731, and the answer was not put in till the 22d of *January* following; and the executrix appearing voluntarily to hear judgment, was what she might justly do; for an executor has a right both at law and in equity, to give expedition to the suit of one creditor, and delay to that of another. — And as to the other objection, it was answered, that the admission of an executrix in a Court of Equity, is a stronger proof of the reality and justice of a plaintiff's demand, and a better foundation for a decree, than her confession at law can be for a judgment; the one being verified by oath, and the other wanting that attestation: And yet, such a judgment obtained at law would indisputably have been a good one, unless it could have been proved fraudulent and collusive for some other reason, than merely because it was founded upon the confession of the executrix. But this decree was not founded upon the bare admission of the executrix; she having particularly stated in her answer, the evidence on which she grounded such admission, by which the justice of the respondents demands appeared; and submitted the whole to the judgment of the Court upon that evidence. And tho' these demands were originally decreed in that manner, yet the appellants, by calling the justice of them in question in the present



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sent cause, had laid the respondents under the necessity of proving it beyond contradiction: And their demands had accordingly been pronounced to be just, by no less than three decrees; by the original decree of the 25th of *January*, 1731; by the decree in the present cause, which was made by his Honour the Master of the Rolls, after a hearing of six days; and at last, upon an appeal from that decree, by the decree which was pronounced by the Lord Chancellor, after a hearing of seven days continuance. It was therefore hoped, that this last decree would be affirmed, and the several appeals dismissed with costs.

And on behalf of the respondents, *Colemore*, &c. who claimed under the decree of the 2d of *February*, 1731; it was said, that their bill in equity against the executrix, was filed before any action was brought against her at law, and that the decree was obtained before any other of the creditors had got judgment at law, and therefore the demand under that decree ought to be satisfied before any subsequent judgments; it being a universal rule in the administration of legal assets, that the creditor, who obtains the first decree, or first judgment, ought to be first paid.

W. Hamilton.  
T. Clarke.

AFTER hearing counsel on these appeals, for six successive days, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed, with this variation; viz. "That in taking the account of what is respectively due to the respondents, who were plaintiffs in the cause wherein the decree of the Court of Chancery, of the 25th day of *January*, 1731, was made, subsequent interest at the rate of 5l. per cent. from the time of filing the bill, shall not be allowed; but that the Master of the said Court of Chancery, to whom the account in this cause stands referred, do inquire and certify, what interest or dividends the assets of the said *Humphry Morrice*, or any part thereof, have produced since the filing of the said bill in that cause: And that after the said Master shall have made his report, the said Court do give proper directions for allowing and paying to the said respondents, the plaintiffs in that cause, such proportion of the interest and dividends, as the principal demands of those respondents remaining unsatisfied, bear to the whole fund of the assets

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“ remaining in the hands or possession of the said *Katherine Morice*, or in the said Court of Chancery : And it is further ORDERED, that this direction shall not delay the payment of the said principal demands, together with the interest due for the same, before the filing of the bill in the said cause ; but the said respondents are at liberty to apply to the Court of Chancery, for the payment thereof respectively, as that Court shall think just.”

Case 39. *Rees Griffith*, - - - Appellant.  
*Thomas Lewis*, Esq; - - - Respondent.

7th June, 1737.

THE Dean and Chapter of *Worcester*, being in right of their church seised in fee of the impropriate rectory, or parsonage of *Old Radnor*, and of all manner of tithes arising and renewing yearly within the said parish ; by indenture of lease under their common seal, dated the 25th of *November*, 1723, demised the same to the Most Noble *James*, Duke of *Chandos*, his executors, administrators and assigns, from the date of the said lease, for 21 years, under the yearly rent therein mentioned.

And, by indenture, dated the 15th of *February*, 1728, the Duke assigned the said lease and premisses to the respondent, his executors, administrators and assigns, subject to the said yearly rent ; whereby the respondent became well entitled to all the tithes and duties arising and growing within the said rectory, and the titheable places thereof.

The appellant, after the said 15th of *February*, 1728, occupied a messuage and lands within the said parish, and particularly thirty acres of meadow and pasture ground ; but neglecting to tithe the same, for the years 1729 and 1730, or to make the respondent any satisfaction for such tithes ; he, in *Michaelmas* term, 1730, filed his bill in the Court of Exchequer, against the appellant, for an account and satisfaction thereof.

To



To this bill the appellant put in his answer; and thereby admitted it to be the general opinion of the country, that the respondent was owner of the tithes; said, that he occupied one messuage, a small garden, five acres of arable, four acres of pasture ground, and an acre and a half of meadow; that as to the meadow, he was tenant at will at 1*l.* 6*s.* a year; and that it was, in the general opinion, tithe free, and never any tithe hay was paid for the same; but, being only tenant at will, and the value of the tithe small, and rather than give any colour for a suit, he ordered his servant, mowing there in 1729, in case the respondent's agent demanded tithe hay, to set it out: That soon after, *Henry Davies*, the respondent's servant, who had been a tithe gatherer 30 years, being offered to have the hay tithed, answered, he never gathered tithe from thence and would not meddle with it, and they might carry it away; whereupon the hay was carried home untithed. That in the year 1730, *Edward Turner*, the respondent's agent, came to the said meadow and saw the hay tithed, and opened one of the cocks; and imagining that no tithes were due, went away, and said he would consult *Howell Lewis*, the respondent's chief agent; and soon after returned, and said, he would not meddle with it; whereupon the appellant carried it home: And that having grazed the said meadow each year, till the middle of *May*, he had but little hay, and believed the tithe thereof was not worth above 1*s.* 6*d.* each year; but knew not how the said meadow became exempt from the payment of tithes.

Issue being joined, several witnesses were examined, who proved the demand of tithe hay of the said meadow, and that the appellant forbid the respondent to take the same; but no proof was given of the pretended exemption.

On the 15th of *November*, 1733, the cause was heard before the Barons of the Exchequer; who decreed, that the appellant should account with and satisfy the respondent, for the value of the tithes of hay of the said meadow, for the years 1729 and 1730: And it was thereby referred to the Deputy Remembrancer, to take such account, and to make his report with all convenient speed; and the cause was to continue in the paper of causes, to be further heard upon coming in of the said report.

In



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In pursuance of this decree, the Deputy, on the 3d of February, 1734, made his report; and thereby certified, that there was due to the respondent from the appellant, for the value of the tithe of hay of the said meadow, for the years 1729 and 1730, the sum of 9s. And the cause being heard upon this report, on the 10th of the same month; the Court decreed, that the report should be confirmed, and that the appellant should pay the respondent the said 9s. reported due, together with the costs of the suit, to be taxed; and which were afterwards taxed at the sum of 51*l.* 5*s.* 8*d.*

R. Pauncefort.

J. Griffith.

The appellant, rather than satisfy this demand, appealed from the decree; insisting, that the bill being founded on a supposed fraud in the appellant in concealing his tithes, and praying a discovery and account of the tithes so supposed to be concealed; and the appellant having, by his answer, denied any concealment; the respondent, in order to entitle himself to any decree upon such a bill, ought to have verified the allegations of it; but which he had not attempted to do. That the appellant having stated the matter of fact, as to the tithe of the meadows, and denied all fraud; and as no fraud was attempted to be proved upon the commission, or insisted on at the hearing; nothing remained in controversy between the parties, or to be accounted for, but a demand of 3*s.* or 4*s.* for which the respondent might have had, and ought to have taken his remedy in a court of law; and not brought the appellant into a Court of Equity for a demand so very inconsiderable, as to be beneath the dignity of the Court to take any notice of. But supposing the decree proper, there was not the least colour to decree the appellant to account for the tithe hay of the year 1730, which he had actually set out, and which the respondent's agent might have carried away, but would not meddle with; nor was there any evidence, that the hay in question was worth 9*s.* If, however, it really was worth that sum, the decreeing costs, which amounted to 51*l.* 5*s.* 8*d.* was surely a punishment more than equal to the appellant's crime in not paying 9*s.*; and especially as he had sworn in his answer, that the respondent never demanded satisfaction. Under these circumstances, therefore, it was hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.



On the other side it was said, that tithes in kind are due of common right, and no presumption from report only, ought to be of any weight to avoid a demand so founded; and tho' the appellant, by his answer, had set up a pretence of exemption from tithes, yet he had given no proof of it; nor had he set up any modus or composition in lieu of tithes. That it appeared clearly from the proceedings in the cause, that the appellant controverted the respondent's right to the tithes; and therefore it was proper to sue in a Court of Equity, in order to ascertain and settle such right. And that the appellant's answer, as to his not disputing the respondent's right, was inconsistent with itself; for tho' he admitted, that he would have paid tithe for his hay, had he thought the respondent would have required it; yet he did not even submit, by his answer, to pay any tithe for the same, tho' the respondent had required it by his bill.

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J. Strange.  
R. Lloyd.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE  
affirmed,  
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*Conrade de Gols, Esq; and John Read,*  
Gent. Assignees under a Commission  
of Bankrupt awarded against *John*  
*Ward,* - - - - - } Appellants.

Case 40.

*Philip Jones, Francis Pyle, Elizabeth*  
*Rogers, Ralph Ward, Knox Ward,*  
*Clarencieux, and Elizabeth his Wife,* } Respondents.  
*Thomas Nettleton, James Lamborne,*  
*and George Wallis,* - - - - - }

23d February, 1737.

*JOHN Ward*, being a trader, became indebted to several persons in many large sums of money; and having committed several acts of bankruptcy, a commission of bankruptcy issued

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Viner, vol. 7.  
p. 66. ca. 9.  
2 Eq. ab. 97.  
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issued against him on the 20th of *November*, 1730; and the appellants being appointed assignees, the bankrupt's estate and effects were assigned to them accordingly, and his creditors came in and proved their debts under this commission, to the amount of 59,000*l.* and upwards.

The bankrupt, with a view to conceal his effects from his creditors, and to defraud them of their just debts; did, about the year 1725, purchase the office of *Clarencieux King at Arms*, in the name of his son, the respondent *Knox Ward*, for which he paid above 3000*l.* He also purchased, in the name of the respondent *Knox Ward*, a messuage and premises called *Pimlico*, in the parish of *St. Martin in the Fields*, in the county of *Middlesex*, of one *Michael Thompson*, for which he gave 2000*l.* The bankrupt also, with the like view to defraud his creditors, executed several fraudulent conveyances of his real and personal estate, without any real or valuable consideration whatsoever. Particularly,

By indentures of the 25th and 26th of *August*, 1725, the said *John Ward*, as well for the support of the said *Knox Ward* in the dignity of his said office, as out of affection to his said son; conveyed and assigned to the respondents *Philip Jones* and *Francis Pyle*, several freehold estates therein mentioned, lying at *Hornchurch*, *Chelmsford* and *Dagenham*, in the county of *Essex*; and all other his lands and tenements whatsoever in *London* and *Westminster*, and in the said county of *Essex* (except the farm called *Hammond's Farm*) and also the manor of *Woolverston* in the county of *Suffolk*; part for a term of 500 years, and part for a term of 200 years; which premises were of the yearly value of 2000*l.* And he also assigned to the respondents *Jones* and *Pyle*, several debts therein mentioned to be due to him, amounting to 9,753*l.* 14*s.* 3*d.* in trust to raise money for the payment of several debts and annuities therein mentioned, and pretended to be due from the bankrupt; and afterwards, in trust for the said *Knox Ward*.

And by indentures of the 3d and 4th of *December*, 1725, he conveyed and assigned to *John Kidgell* and *Branston Oulson*, *Hammond's Farm* in *Hornchurch*, (which was excepted out of the last deed) a lease of the rectory of *Hackney* in the county of *Middlesex*,



*Middlesex*, a lease of an house in *Bearbinder-Lane*, *London*, a lease of six messuages in *Westminster*, and several mortgages and debts due to him, amounting to 10,139*l.* 10*s.* 4*d.* in trust for the payment of several fictitious debts therein mentioned; remainder to the said *Knox Ward*; with a power reserved for the bankrupt, to charge the premises with the payment of any other of his debts: And it was covenanted, that all the premises thereby conveyed and assigned, should, in the first place, be subject to indemnify the said *Kidgel* and *Oulson*, against whatsoever they should do about the execution of the trusts thereby reposed in them, provided they did every such act with the privity and direction of the said *Knox Ward* in writing first had.

The bankrupt, by other indentures of the 2d and 3d of *May*, 1726, conveyed and assigned to the said *Kidgell* and *Oulson*, for a term of 500 years, two houses in *Weymouth*, three houses and the reversion of a house at *Ryegate*, *Turner's-Hall* and twelve houses in *Philpot-Lane* and *Smitby-Lane*, *London*, a lease of two acres of land in *Havering*; ten houses in *Brick-Lane*, a house and two fields in *Shacklewell*, a moiety of nineteen houses in *Longditch*, five houses in *St. Sepulchre's*, and one in *Clement's-Lane*, *London*, two turnpikes on *Hertford* river, several policies of assurance for lives, and several debts due to him to the amount of 42,000*l.*; in trust for the payment of the same annuities and debts, pretended to be provided for by the aforesaid deeds of the 25th and 26th of *August*, 1725; and afterwards, in trust for the respondent *Knox Ward*, and his heirs for ever: With a proviso, that such of the said debts as should be discharged by the respondents *Jones* and *Pyle*, should not remain a charge on the premises contained in this deed.

By other indentures of the 1st and 2d of *March*, 1727, reciting the power reserved for the bankrupt to charge the premises conveyed to *Kidgell* and *Oulson*, with the payment of any other of his debts; and that he was desirous to provide for the payment of 16,094*l.* 11*s.* 9*d.* due to the respondent *Knox Ward*, and 620*l.* 16*s.* 7*d.* due to the said *Kidgell* and *Oulson*, on the balance of accounts therein mentioned to be stated on the 2d of *January*, 1727; and also for the payment of the debts due from the bankrupt to 263 persons, in a schedule thereunto annexed named; (several of which pretended debts



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debts were not specified by any sum, the provision being in general terms for payment of what was due to them) the bankrupt not only charged the premises before conveyed to *Kidgell* and *Oulson* with the said pretended debts; but also, the better to enable them to pay the same, assigned several judgments and mortgages, to the amount of 29,718*l.* and also three college leases; with a proviso, that it should be lawful for the bankrupt to give his advice and assistance in settling and adjusting the said pretended debts, and the trustees were to pay according to such adjustments, provided the same appeared to be for the good of the estates.

By other indentures of lease and release of the 7th and 8th of *January*, 1725, in consideration of 800*l.* therein mentioned to be paid the bankrupt by the respondent *Knox Ward*, he conveyed to him *Turner's-Hall* and five houses in *Philpot-Lane*, part of the premises, which he afterwards conveyed to trustees by the deeds of the 2d and 3d of *May*, 1726, before stated.— And by another deed, dated the 7th of *March*, 1729, in consideration of 1200*l.* therein mentioned to be paid to him by the respondent *Knox Ward*, he assigned even all his household goods to the said respondent.— By another deed, dated the 20th of *December*, 1729, in consideration of 200*l.* therein mentioned to be paid to him by the respondent *Knox Ward*, the bankrupt assigned to him several leases of four houses in *Kirby-Street*, and four houses in *Cross-Street*, *Hatton-Garden*, in the county of *Middlesex*, with a piece of ground thereunto adjoining; and with liberty of renewal, as therein is mentioned.— And by a deed poll, dated the 10th of *November*, 1730, the bankrupt, in consideration of 50*l.* therein mentioned to be paid him by the respondent *Knox Ward*, assigned to the said respondent, a debt due to him from one *Abraham Cropp*.

None of these several sums were paid by the respondent *Knox Ward*, he, at that time, having no money of his own, and being maintained by his father; nor were the sums in the said respective deeds mentioned, a valuable consideration for the premises thereby assigned and conveyed. But the more effectually to cover and secrete the bankrupt's effects from his creditors, he and his said son, without any real or valuable consideration, prevailed on the respondents *Jones* and *Pyle*, and the said *Kidgell* and *Oulson*, to convey and assign to the respon-



respondent *Knox Ward*, several of the estates, debts and effects, so conveyed and assigned to them by the bankrupt as aforesaid.

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And by indenture, dated the 12th of *June*, 1729, the respondent *Knox Ward* declared, that all accounts between him and the trustees relating to the trusts before mentioned, were settled and adjusted; and for the more speedy payment of the trust debts then remaining unsatisfied, he thereby empowered the said trustees, out of the residue of the premises comprised in the deeds of the 25th and 26th of *August*, and 3d and 4th of *December*, 1725, to raise money and pay the debts mentioned in the deed of the 2d of *March*, 1727: And reciting, that *Knox Ward*, by an account stated between him and the respondent *Ralph Ward*, was indebted to the said *Ralph Ward* in the sum of 3239*l.* 1*s.* 5*d.* he subjected the premises in the said several deeds of trust to the payment thereof.

By indenture quinquupartite dated the 13th of *June*, 1729, made between the respondent *Knox Ward* of the first part, the said *John Ward* of the second part, the respondents *Jones* and *Pyle*, and the said *Kiagell* and *Oulson* of the third part, the respondents *Thomas Nettleton* and *Elizabeth* his daughter of the fourth part, and the respondents *James Lamborne* and *George Wallis* of the fifth part; reciting the before mentioned deeds of trust, and that a marriage was then intended to be had between the said *Knox Ward* and the said *Elizabeth Nettleton*; in consideration thereof, and of 4000*l.* therein mentioned to be paid by the said *Thomas Nettleton* to the said *Knox Ward*, as a marriage portion with his said daughter; the said *Knox Ward* covenanted and agreed with the said *Thomas Nettleton*, that the residue of the trust premises, not before disposed of by the said trustees, should, after payment of the debts with which they were charged by the aforesaid deeds of trust, stand charged with the several yearly sums following, viz. 400*l.* a year to the said bankrupt during his life, if he personally demanded the same, but not otherwise; and after his death, the like sum of 400*l.* a year to *Rebecca* his wife for life, and 400*l.* a year to the respondent *Knox Ward* for life; and after his death, to pay 400*l.* a year to the respondent *Elizabeth*, until money could be raised out of the surplus of the said premises, for the purchasing of lands of inheritance of 1000*l.* a year; which,



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when raised, the said *Knox Ward* covenanted should be laid out in such purchase, by the consent of *Knox Ward*, if living; if not, of the bankrupt, if living; if not, of *Ralph Ward*, or the heirs of his body; and in default of such issue, with the consent of the right heirs of *Knox Ward*: Which lands, when purchased, were to be conveyed to *Lamborne* and *Wallis*, and their heirs, for 200 years, upon the trusts after mentioned; and after the determination of that term, to the said *Knox Ward* and the heirs of his body; and in default of such issue, to the respondent *Ralph Ward* and the heirs of his body; and for want of such issue, to the right heirs of *Knox Ward* for ever.

The trust of the 200 years term, was for raising 400*l.* a year for the bankrupt during his life, if he, in person, should demand the same; and after his death, to *Rebecca* his wife; and the 400*l.* a year to *Knox Ward* and his wife, with a power to raise 6000*l.* for younger childrens portions. And in this deed was a proviso, that in case the residue of the trust estates should raise more money than would purchase 1000*l.* a year, the same should be laid out in a purchase of lands of inheritance, with such consent as aforesaid, to be settled to the use of *Knox Ward* and the heirs of his body; and in default of such issue, to *Ralph Ward* and his heirs; and in default of such issue, to the right heirs of *Knox Ward*.

By another indenture, dated the same 13th of June, 1729, between the respondent *Knox Ward* of the first part, *Thomas Nettleton* and *Elizabeth* his daughter of the second part, and *James Lamborne* and *George Wallis* of the third part; the said *Knox Ward* agreed, that the respondents *Lamborne* and *Wallis* should stand seised of the manor of *Woolverston*, as a collateral security for the raising money to purchase the 1000*l.* a year.

The several debts and annuities pretended to be provided for by the said several deeds of trust, were wholly or chiefly fictitious; and not due or payable by or from the bankrupt at the time of the execution of those deeds: Nor did the trustees ever act in the said trusts, otherwise than by executing and signing such deeds and accounts as were brought to them ready engrossed by the bankrupt, or the respondent *Knox Ward*; which were fictitious



titious accounts, and calculated only to give an appearance of a consideration to those deeds.

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The respondent *Knox Ward* was a man of no fortune, but was kept and maintained by his father, and never paid, or was able to pay the considerations mentioned in any of the aforesaid conveyances, from the bankrupt or the trustees to him; which amounted in the whole to upwards of 38,000*l.* Nor were they valuable considerations for the premisses comprised in those conveyances; nor did he pay for the purchase of the office of *Clarencieux*, or the estate purchased of *Michael Thompson*, but the same were paid for by the bankrupt, or out of the bankrupt's money; nor did the respondent *Knox Ward* receive the 4000*l.* portion with his wife, as mentioned in the deed of the 13th of *June*, 1729. But all these conveyances and purchases were made merely to defraud the bankrupt's creditors, and with no other intent whatsoever.

*Knox Ward* having, however, possessed himself of all the deeds, writings and securities, estate and effects of the bankrupt, by virtue of these fraudulent conveyances and assignments, and insisting to hold the same; the appellants, on the 20th of *June*, 1732, filed their bill in the Court of Chancery, against the respondents and others; to set aside the said deeds, and to have all the deeds, writings and securities, estates and effects of the bankrupt delivered to them.

To this bill the respondents *Knox Ward* and his wife put in a plea and answer, and thereby insisted upon the several deeds before mentioned, and upon their title to the premisses in pursuance thereof; which plea, on being argued, was ordered to stand for an answer, with liberty for the appellants to except, and the benefit thereof was reserved till the hearing of the cause. And after exceptions taken, the said respondents put in two other answers; and thereby insisted that the said *John Ward* was no bankrupt, nor had committed any act of bankruptcy.

The cause being at issue, and several witnesses examined on both sides, came on to be heard before the Lord Chancellor *Talbot*, on the 4th of *December*, 1736. And the debt of Mr. *Surtees*, the petitioning creditor, who sued out the commission, appearing



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appearing to be, by a promissory note given by the bankrupt to him for 112*l.* dated the 7th of *July*, 1730, for the balance of an account; and the appellants having alledged, by their bill, that the bankrupt had committed an act of bankruptcy before the execution of the deeds, some of which were in 1725; and one of the appellants witnesses having proved an act of bankruptcy in 1726, an objection was started by the respondents counsel, that the commission of bankruptcy was void; insisting, that *John Ward* appeared to be a bankrupt in 1726, and was therefore incapable, by law, of contracting a debt, or giving a note to the said Mr. *Surtees* in the year 1730; and consequently, that the commission of bankruptcy was unwarrantably sued out upon the petition of a person, who was not a real creditor. And tho' several acts of bankruptcy were fully proved to be committed by the said *John Ward* after *July*, 1730, and no other commission issued, or creditor complained, but all the creditors that the appellants ever heard of, came in and proved their debts under the said commission; and tho' the respondents proved by many witnesses, that the bankrupt appeared publicly in 1729, and insisted, by their answers, that the said *John Ward* was not a bankrupt; yet the Lord Chancellor was of opinion, that the appellants bill ought to be dismissed; it appearing, that the bankrupt had committed an act of bankruptcy before the petitioning creditor's debt accrued: His Lordship, therefore, did not go into the merits of the cause; but ordered, that the appellants bill should be dismissed, without prejudice to their bringing a new bill, as they should be advised.

J. Strange.

J. Browne.

W. Hamilton.

J. Gambier.

The appellants therefore appealed from the decree; and on their behalf it was argued, that if an act of bankruptcy, secretly committed by a person continuing in a public course of trade for several years afterwards, should be allowed to overturn a commission carried on by the whole body of the bankrupt's creditors, who had joined in the commission, by seeking relief under it, and not impeached or opposed by one single creditor, it would be of dangerous consequence to trade and credit; for by these means, the several acts made for the relief of creditors, might, in many instances, become a snare and delusion, instead of a relief and protection to them. And if this doctrine should be



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be established, it would greatly deter creditors from taking out commissions, which are attended with very great expence, for they never can be sure that a prior secret act of bankruptcy has not been committed; it would also be the highest encouragement to dishonest debtors to commit secret acts of bankruptcy, on purpose to protect them from commissions, or to render them fruitless. That tho' an act of bankruptcy disables the bankrupt from contracting a debt with another person to the prejudice of creditors, prior to the act of bankruptcy, if they insist on their priority; yet the bankrupt may contract a debt, not only to charge his person, but even his effects, if they are sufficient to pay the whole, or if the prior creditors do not insist on a preference. And if they waive their preference, and allow such person to be a creditor, neither the bankrupt himself, or any of his confederates, are at liberty to say he is not a creditor. That the several statutes which forbid the issuing of commissions, except on the petition of a creditor for 100*l.* were not in force when this commission issued; which was grounded on the old statutes, authorising a commission to issue on complaint to the Lord Chancellor. That a creditor having a right in any event, to have his debt paid out of the effects of his debtor, though others may have a preference to him, is aggrieved by the fraudulent concealment of those effects; and has an equal, if not a greater right to complain, than those creditors who are prior to him, because he is in greater danger of losing his debt by the concealment: And in the present case it was not proved, nor even pretended, that there may not be sufficient of the bankrupt's effects to satisfy the petitioning creditor's debt, though all the other creditors should insist upon a priority; but which they had not done. As to the merits of the case, it was apprehended, that the several deeds before stated would appear to be voluntary, fraudulent and void, as against the bankrupt's creditors. And tho' the articles made on the marriage of the respondent *Knox Ward*, might seem to be founded on a valuable consideration; yet as they rested only in covenant, and as the several conveyances in trust for him, were fraudulent and void as against creditors, the articles ought not to be set up to their prejudice.

On the other side it was said, that the facts on which the present question turns, stand thus: The appellants have

D. Ryder.  
N. Fazaker-  
ly.



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charged by their bill, that *John Ward* was a bankrupt before the making of any of the deeds therein stated; the first of which are dated in the year 1725; and they have proved, by *Joseph Savage*, whose deposition was read, that he denied *Ward* to several of his creditors in the year 1726, by his express order, which was unquestionably an act of bankruptcy; they also proved, that *Ward* caused himself to be denied to several of his creditors in 1730, and in the intermediate time between these two acts, became debtor to *Surtees*, on whose application alone the commission of bankruptcy issued. The question therefore is, Whether this commission, thus issued, can be maintained? If it cannot, then the bill is clearly improper, and the order for dismissing it right; but if the commission can be maintained, then the appellants will have a right to proceed. — On the part of the respondents however it must be contended, that the commission is not maintainable; for no commission can issue, but upon the petition of some person, who has by law a right to sue for it; and every commission issuing otherwise, and all the proceedings under it, are illegal and void. None have a right to sue out a commission but creditors, and such creditors only, who can be intended to be defrauded by the bankruptcy; but this cannot be the case of those who do not become creditors, till after the act of bankruptcy is committed, unless a man can abscond to avoid creditors when he has none. Besides, those who become creditors after the bankruptcy committed, cannot be admitted to prove their debts, or receive a dividend with the rest under the commission issued; and it would be an absurdity to allow a man to be a petitioning creditor, and yet not capable of relief under the commission he applies for. Now tho' *John Ward* did cause himself to be denied in the year 1730, to a creditor, after the debt contracted to Mr. *Surtees*, yet this was apprehended to be wholly immaterial; since he became a bankrupt by the first act, which over-reached all intermediate transactions between that and the time of the commission; and as he continued a bankrupt to the time of his second denial of himself in 1730, this could not make him more a bankrupt than he was before, or prevent his estate from vesting in legal assignees, as from the time of the first absconding. But the appellants were so far from making that to be their case by their bill, that they carried the  
act



act of bankruptcy so far back as the year 1725, and proved it on purpose to destroy the intermediate deeds and settlement, under which the respondents claimed as purchasers on a marriage contract. It was therefore hoped, that the appeal would be dismissed with costs.

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AFTER hearing counsel on this appeal, the following question was put to the Judges, who attended according to order; viz. "Whether the commission of bankruptcy issued on the 20th of November, 1730, against *John Ward*, on the petition of *George Surtees*, was good and valid in law?" And the Judges having delivered their unanimous opinion in the affirmative; it was ORDERED and ADJUDGED, that the decree of dismissal should be reversed; and that the Court of Chancery should proceed to hear the cause upon the merits, according to the course of that Court.\*

DECREE reversed.  
Jour. vol. 25.  
P. 174, 176.

George

\* Pursuant to this order, the cause was heard before the Lord Chancellor *Hardwicke*, on the 14th of December, 1738; when the parties were directed to proceed to a trial at law, at the bar of the court of *King's Bench*, upon the following issue; viz. "Whether *John Ward* became a bankrupt on or before the 13th day of June, 1729?" And if the jury should find, that he became a bankrupt before that day; the particular time, at which he so became a bankrupt, was to be indorsed on the record. This issue was accordingly tried; and a verdict was found, that *John Ward* became a bankrupt on the 26th of August, 1725.—On the 10th and 17th of November, 1739, the cause was heard upon the equity reserved; when his Lordship ordered the further hearing to stand over, that he might, in the mean time, be certified, by the Judges before whom the issue was tried, on what act of bankruptcy the verdict was founded.—This enquiry having been made, the cause came on again upon the 12th and 14th of December following; when the Lord Chancellor declared, that he had been informed by the Lord Chief Justice of the court of *King's Bench*, in the name of himself and the rest of the judges before whom the issue was tried, that no evidence was given on the said trial of any act of bankruptcy committed by the said *John Ward*, on or before the 26th day of August, 1725, besides the making and executing of the indentures of the 25th and 26th of August, 1725; and that the making and executing of the said indentures, was the ground on which the jury found their verdict. His lordship therefore declared, that the said indentures of the 25th and 26th of August, 1725, and all the conveyances, assignments and other deeds subsequent thereto, sought by the plaintiff's bill to be set aside, and insisted on by the defendants, *Knox Ward* and his wife, in their plea, (except the marriage articles of the 13th of June, 1729, and the other indenture of the same date) were executed by the said *John Ward*, without any real and valuable consideration, and were deceitfully contrived, with intent to defraud the just creditors of the said *John Ward* of their debts; and also, that the said marriage articles of

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1739.  
Lib. B. p. 74.

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p. 119. ca. 2.  
by the name  
of Read v.  
Ward.

the



Case 41. *George Mackenzie, Esq;* - - Appellant.

The Right Honourable *William, Mar-*  
*quis of Powis, and Robert Garden,* } Respondents.  
 Gent. Administrator of Captain *Ro-*  
*bert Sempill, deceased,* - - }

1st March, 1737.

**T**HE appellant, in the year 1721, residing at *Paris*, and being possessed of one hundred *old* actions, or shares in the *India* Company there, which cost him 10,000 *livres* each; and the *French* government soon after calling in all such old actions,

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the 13th of *June*, 1729, and the said other indenture of the same date, were fraudulently contrived with the like intent, and ought to be deemed void as against the said creditors; except as to the jointure of 400 *l. per ann.* thereby agreed to be settled on the defendant *Elizabeth*, the wife of the defendant *Knox Ward*; and the 6000 *l.* thereby provided for portions for the children of the marriage; and such provision of maintenance as was thereby agreed on for such children, not exceeding the interest of the said portions: And therefore it was ordered and decreed, that all the said conveyances, assignments and other deeds, except the said marriage articles, and indenture of the 13th of *June*, 1729, should be set aside in respect of the plaintiff, and the other creditors of the said *John Ward*; and that the defendants, the trustees named in the said deeds, or any of them, and the defendants *Knox Ward* and *Ralph Ward*, should, by proper conveyances and assurances, at the expence of the defendant *Knox Ward*, convey and assign to the plaintiff, the surviving assignee under the said commission of bankruptcy against the said *John Ward*, his heirs, executors and administrators respectively, all the manors, messuages and lands, and all the goods, chattels and debts remaining in specie, or unreceived; and all other the premises comprised or mentioned in the said several conveyances, assignments and deeds, or any of them, in trust and for the benefit of the creditors of the said *John Ward*, who had sought, or should seek relief under the said commission; and to be distributed and disposed of according to the statutes made concerning bankrupts, free from all incumbrances done by them or any of them, except the said jointure of 400 *l. per ann.* and the portions and maintenances aforesaid; and all proper parties were to join in such conveyances and assurances as the master should direct: And it was further ordered, that all deeds and writings relating to any of the said premises, in the custody or power of any of the defendants, should be produced before the master upon oath; and that all the said deeds and writings, except the said marriage articles and indenture of the 13th of *June*, 1729, should be delivered to the plaintiff.



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actions, an account was taken to whom they belonged, and what had been paid for them respectively, to the end that satisfaction might be made to the proprietors: And the government there thought fit to give other actions, called *liquidated* actions, in

plaintiff. And it was further ordered and decreed, that such of the defendants as were possessed of any part of the real or leasehold estate of the said *John Ward*, the bankrupt, comprised or mentioned in any of the said conveyances, assignments, or deeds, so set aside, should deliver possession thereof to the plaintiff; and that all the defendants should come to an account before the Master, for so much of the personal estate of the said *John Ward*, and of the rents and profits of his real and leasehold estates, as had been received by, or come to the hands of them, or any of them; or to the hands of any other person or persons, by their or any of their order, or for their or any of their use respectively, upon or since the said 26th day of *August*, 1725. And it was ordered and decreed, that the said defendants should deliver to the plaintiff, such part of the said personal estate as was remaining in specie, in the custody or power of them, or any of them respectively: In the taking of which accounts, the Master was to make to all parties, all just allowances; and particularly, an allowance for all such sums of money, as they or any of them should appear to have paid really and *bona fide*, in satisfaction of any of the just debts of the said *John Ward*, before the issuing of the commission of bankruptcy against him; and if any of such debts should appear to have been paid by them, or any of them, since that time, then they were to stand in the place of the creditors so paid, to receive such dividend or dividends out of the said estate, under the said commission of bankruptcy, as such creditors would respectively have been entitled to: And it was ordered and decreed, that the defendants should pay to the plaintiff what should be found due from them, or any of them, on the balance of the said accounts respectively; but the making of the conveyances and assurances, before directed to be made by the defendants to the plaintiff, was not to be delayed by reason of the said account directed to be taken.—And as to the said marriage articles, and the other indenture of the 13th of *June*, 1729, it was ordered and decreed, that in respect of the plaintiff, and the other creditors of the said *John Ward*, the same should be set aside, as to all the uses, trusts, covenants and clauses therein contained, except as to the said annuity or rent-charge of 400 *l. per ann.* agreed to be settled on the defendant *Elizabeth* for her jointure, after her husband's death; and the said sum of 6000 *l.* thereby agreed to be provided for the portions of the children of the marriage, and the maintenances of such children, not exceeding the interest of their said portions; and the Master was to take care, that out of the estates before directed to be conveyed and assigned to the plaintiff, or a sufficient part thereof, a proper and sufficient security should be made to the defendant *Elizabeth*, or to trustees for her benefit, to be approved by the Master, for the said annuity or rent-charge of 400 *l. per ann.* to commence from and after the death of the said defendant *Knox Ward*, her husband; and also a proper and sufficient security to such trustees, for the said sum of 6000 *l.* and such maintenance as aforesaid. And it was ordered and decreed, that the said annuity or rent-charge of 400 *l. per ann.* and the said sum



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in lieu thereof; by the numbers of which liquidated actions, it appeared, who were the proprietors of the old actions, and what they cost. And accordingly, among others, an account was taken of the appellant's one hundred old actions so called in, and what they really cost; and thirty liquidated actions, from No. 17870, to No. 17899, both inclusive, were issued and delivered to the appellant in lieu of them.

In the month of *July*, 1723, the respondent, the Marquis of *Powis*, *Anne* Countess of *Carington*, his sister, and the Lady *Mary Herbert*, his daughter, being in *Paris*, and having a prospect of obtaining some considerable advantage from the government of *France*, by having these thirty liquidated actions in their hands, applied to the appellant to deposit the same with them: And the appellant having a great opinion of the respondent the Marquis, and relying singly upon his credit, was prevailed upon, after much intreaty, to entrust his Lordship and the said Ladies with the liquidated actions, for fifteen days; at the expiration whereof they were to be restored to the appellant.

Accordingly the appellant, on the 16th of *July*, 1723, N.S. delivered the said thirty liquidated actions to the respondent the Marquis and the Ladies; who thereupon gave a receipt for the same, in the *French* language, to Captain *Robert Sempill*, who was employed by the appellant to deposit these actions in their hands, and who took the said receipt in his own name, barely as a trustee for the appellant; which receipt was in the following words:

*Nous soussignez my Lord Duc de Powis, Madame la Comtesse de Carington, et Mademoiselle de Powis, reconnoissons avoir reçu de Monsieur Robert de Sempill, Capitaine dans le regiment de Dillon, le nombre de trente actions dont le dividendes des six derniers mois de l'année 1722, sont attachées depuis No. 17870, jusqu'à No. 17899;*

of 6000*l.* and maintenances, should be settled and secured in such manner, upon such trusts, and subject to such conditions, powers and contingencies, as were agreed upon by the said marriage articles. And it was further ordered, that the defendant *Knox Ward*, should pay to the plaintiff his costs, both at law and in equity, to this time, to be taxed by the Master; and the consideration of subsequent costs, and all further directions were reserved, until after the Master should have made his report.



que nous nous obligeons garder entre nous mains nous étant confiées  
comme un dépôt les quelles memes actions des No. 17870, 17899,  
cy dessus nous nous engageons solidairement \* de rendre au dit Sieur  
Sempill, ou a son, ordre le vingte un trente un du present mois de  
Juillet, sans autre jour de grace; et pour l'execution du present  
engagement nous elisons nos domicils a l'hotelle de Bruxelles rue  
St. Benoist, Fauxbourg St. Germain. Fait a Paris le seize Juillet  
mille sept cent vingt trois. — Upon the back of which re-  
ceipt, was an endorsement in the words following; viz.  
"A Paris 16 Juillet, 1723. Je cede, a Monsieur Mackenzie et  
"a son ordre, les trentes actions cy dedans, valeur recue dudit  
"Sieur Robert Sempill."

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This receipt being translated into *English*, is to the effect  
following: "We the underwritten, my Lord Duke of *Powis*,  
"Madam, the Countess of *Carington*, and Mademoiselle of  
"Powis, do acknowledge us to have received of Mr. Robert  
"Sempill, Captain in the regiment of *Dillon*, thirty actions;  
"on which the dividends for the last six months of the year  
"1722, are due, from No. 17870, to 17899, both inclusive;  
"which we oblige ourselves to keep in our hands, being en-  
"trusted with us as a deposit: Which same actions, from  
"No. 17870, to 17899, as above, we jointly and severally en-  
"gage ourselves to restore to the said Mr. Sempill, or his order,  
"the twenty-first, thirty-first of this present month of *July*,  
"without any other day of grace: And for the execution of  
"this present engagement, we have closen our domicil at the  
"hotel of *Brussels*, the street of *St. Bennet*, in the suburbs of  
"St. Germain. Done at Paris the sixteenth of *July*, 1723."  
And the endorsement is, in *English*, to the effect following:  
"Paris, 16th *July*, 1723. I assign to Mr. Mackenzie, and his  
"order, the within thirty actions, for value received of that  
"Gentleman, Robert Sempill."

\* In the margin of the appellant's printed case, is the following note. "The  
"meaning of this well known term in the law of *France*, is explained in *Domat's*  
"Civil Law, in its natural order; and in the translation thereof by Dr. *Strahan*,  
"book iii, title 3. in the chapter concerning solidity among debtors; and in the  
"following dictionaries of arts and sciences, of the greatest authority in *France*,  
"viz. *Dictionnaire de l'Academie Francoise*; *Dictionnaire de Trevoux*; *Dictionnaire de*  
"*Furetiere*, vide the word *Solidairement*. By which authorities it appears, that that  
"word means jointly and severally, or, each for the whole."



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The time of restitution elapsing, the appellant applied to these noble persons to have back his actions; but, to his great surprise, was put off with repeated promises and delays; and after many fruitless solicitations, was forced, in *December*, 1723, to commence a suit against them for relief, in the name of the said Mr. *Sempill*, his trustee, in one of the Courts of justice in *Paris*; and in the month of *May*, 1724, he obtained a decree against them for 150,000 *French* livres, principal money, amounting to 6900*l.* sterling, in case they did not restore the said numerical actions forthwith; and also for 15,000 *livres*, amounting to 690*l.* sterling, for damages, and for 1250 *livres*, amounting to 58*l.* sterling, for costs.

By this decree, the defendants had their election either to restore the identical actions to the appellant, or to pay him 150,000 *livres*, as the value thereof; but being determined to do neither, and to elude the force of the decree, they soon after withdrew from *France*, the Ladies into *Spain*, and the respondent the Marquis into *England*; without making the appellant any satisfaction.

The appellant being thus defeated of the benefit of his decree, and the actions themselves being of great value; and the said defendants, or some person by their order and for their use, continuing to receive the annual dividends and produce of the actions, which every year amounted to a considerable sum; the appellant was obliged to follow the respondent the Marquis, for redress into *England*: And accordingly, in *Michaelmas* term, 1733, exhibited his bill in the Court of Exchequer, against the Marquis alone (the Ladies continuing in *Spain*, and not being amenable by the process of any Court of justice in *England*); praying, that the Marquis might come to an account with him for the dividends of the said actions, and might restore the actions themselves to the appellant, or make him an adequate satisfaction for the same.

The Marquis, in *Easter* term, 1734, put in his demurrer to part, and his answer to the residue of this bill: The substance of which demurrer was, For that the said note or receipt was given at *Paris* in *France*, and the said contract to be performed there by him, jointly with the said Ladies *Carington* and *Herbert*



bert; and that therefore, the Court ought not to take cognizance thereof, especially as the plaintiff had obtained a decree in *Paris*, against him the said Marquis and the said Ladies, for 150,000 *French* livres, amounting to 6900*l.* sterling, and for other great sums for costs and damages; which decree was still in force and unreversed; and if the plaintiff should proceed in the said Court of Exchequer, he might receive a double satisfaction: And also for that, in case the said contract was cognizable in *England*, the same was properly triable at law.

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By his answer he admitted, that the government in *France* did call in all the old actions, or shares in the said company, and that actions, called *liquidated* actions, were given in lieu of such old actions: Believed, that by such liquidated actions the government there might know who were the proprietors of the old actions; and that he had heard that the plaintiff, in the name of Mr. *Sempill*, commenced such suit in one of the Courts of justice in *Paris*, and procured such sentence or decree, as aforesaid; which he believed was still in force against him the said Marquis, and the said Ladies.

The demurrer coming on to be argued before the Barons, on the 22d of *June*, 1734, they were pleased to over-rule the same.

And the answer, upon exceptions taken, being reported insufficient, the respondent the Marquis, put in a further answer; by which he admitted, that some time in 1723, he signed a paper, written in *French*, relating to a deposit of actions made by Mr. *Sempill*; but insisted, that as the said contract was to be performed by him jointly with the said Ladies at *Paris*, and not elsewhere, the plaintiff ought rather to proceed upon the said decree made in *Paris*, than in the said Court of Exchequer; which ought not to decree a specific performance of the said contract, by obliging him to restore the said thirty actions, the same having been deposited with him jointly with the said Ladies, and therefore he ought not to be solely charged therewith; and he the rather hoped the Court would not take cognizance thereof, as well for that the same was properly triable and determinable at law, as for that he did not promise either the plaintiff, or Mr. *Sempill*, to restore the said actions, or any thing in lieu thereof, at any time within six years next before the exhibiting the plaintiff's bill.



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This answer being also adjudged insufficient; the Marquis, by his third answer, admitted, that the plaintiff was prevailed on about the month of *July*, 1723, to entrust the said Ladies with the said actions, and did then deliver the same to them; but whether the plaintiff would not have been persuaded thereto but upon the credit of him the said Marquis, he knew not. He also admitted he signed a paper, wrote in *French*, relating to a deposit of actions; but whether to the effect in the bill mentioned, he could not set forth: He further admitted, that the Ladies then were, and had for some years before been, at *Seville* in *Spain*; and that since his return into *England*, he had been often applied to on the plaintiff's behalf, by divers persons, for satisfaction of the said actions, but could not, at that distance of time, recollect what answer he gave them, nor whether he lately, or ever, acknowledged the justice of the plaintiff's demands, to the said persons; but admitted, he did not know or remember that the plaintiff ever received any satisfaction from the Ladies, or either of them, for his said actions.

To these answers the appellant replied, and publication being passed, the cause came on to be heard on the 6th of *July*, 1737; when an exception being taken for the respondent the Marquis, that the representative of Mr. *Sempill* was not before the Court as a party; the Court, on debate of the matter, directed the cause to stand over, with liberty for the appellant to add parties.

Mr. *Sempill* having died at *Paris* intestate, and no administration having been sued out of his effects; administration thereof was granted, under the seal of the Prerogative Court of *Canterbury*, to the respondent *Garden*; to the end and intent only to attend, supply and substantiate the proceedings in this cause, or any other cause between the same parties, touching the premises. The appellant thereupon amended his bill, by making the respondent *Garden* a party; who by his answer admitted, that the thirty actions in question were the property of the appellant, and that Mr. *Sempill*'s name was used in the said writing, in trust only for the appellant.

On the 2d of *December*, 1737, the cause came on again to be heard; when a like objection was taken by the Marquis's counsel, in point of form, for that the Ladies who had subscribed,  
and



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and were bound by the receipt together with the Marquis, were not brought as parties before the Court: But it appearing, by his Lordship's answer, that those Ladies were, and had for several years before been, in *Spain*, and consequently, were not amenable by the process of any Court of justice in *England*; the Court were of opinion, that the proceedings were regular, without bringing the Ladies before the Court as parties. And therefore were pleased to decree, that the appellant should be at liberty to bring an action or actions at common law, against the respondent the Marquis, and the said Ladies, or any or either of them, touching the matters demanded by the bill, as he should be advised: And that the respondent *Garden* should permit the appellant to make use of his name in such action or actions, or any other action or actions that he should think fit to bring, touching the said matters; he the appellant first giving sufficient security to the respondent *Garden*, to indemnify him from costs in that behalf: And that the appellant's bill should be retained for one year; and that the cause should be continued in the paper of causes, to be further heard after the determination of such suit or suits at common law, so as that the same should be determined within one year then next ensuing; when the Court would (in case such trial should be had in the mean time) make such farther order therein, as should be just: And the consideration of costs was reserved till the further hearing of the cause.

From this decree the appellant appealed; insisting, that his remedy lay properly in a Court of Equity, as it was the case of a deposit, which is a trust. That it was the case of an agreement, a specific performance whereof can only be decreed in a Court of Equity, and which in equity is considered as performed, at the time when it ought to have been performed. It was also the case of an account of dividends, and other annual and casual produce of thirty actions, or shares in the *French East-India* Company, for many years; which could not be so well taken at law as in a Court of Equity, where the respondent might be examined upon interrogatories, and obliged to produce all books and papers relating to such account. Besides, the appellant was altogether without remedy at law; the respondent being at liberty to plead the statute of limitations, even during the time the cause had depended in the Court of Exchequer;

W. Hamilton.  
W. Murray.

whereas



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whereas in equity, the statute of limitations is no bar in the case of an agreement, or in the case of any trust; and much less in the case of a deposit, the profits of which are annually received by the person with whom it is deposited. If the Court had wanted the assistance of a jury to ascertain any fact, an issue might have been directed, to which the appellant could have had no objection; but to send him to bring an action at law, when under the circumstances of his case no action would lie, was in effect denying him any relief at all; though the justice of his case was not denied by the respondent, who did not dispute the right which was incontestible; but contended in a Court of Equity, that this right should be without a remedy: And, for that purpose, rested his defence principally upon these two points; either, that the appellant ought to be barred from prosecuting any suit here, because he had obtained a decree for it in *Paris*, tho' he had never received any satisfaction in pursuance of that decree, nor could receive any, the respondent being come over to *England* with all his effects, and his daughter and sister withdrawn into *Spain*: Or, if the appellant's demand was cognizable here, notwithstanding the decree obtained in *Paris*, yet, it was only triable at law; because at law, the appellant could not now possibly maintain any action. It was therefore hoped, that the decree would be rectified; and that the respondent the Marquis, would be decreed to restore to the appellant the said numerical actions, and account with him for the dividends accrued thereon; or make him an adequate satisfaction in that behalf.

J. Strange.  
N. Fazaker-  
ly.

On the other side it was contended, that the appellant's cause of suit was a mere legal demand, and that there was now no obstruction to his bringing an action at law, he having the liberty to use the name of *Sempill's* representative for that purpose; and therefore there was no necessity for a Court of Equity to interpose in this case. That the respondent ought not to be deprived of the benefit of a legal trial; and in case of an action being brought, he ought to be at liberty to plead such matters, and make such defence as he should be advised, and as the law allowed. That the note and the promise thereby made, was a matter triable at law only; and in case the appellant was entitled to any satisfaction from the respondent alone, who never had the actions, the damages in respect thereof, ought



ought to be settled by a jury. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

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AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that this addition should be made to the decree, viz. ["and that in such action or actions to be brought at law, the respondent the said Marquis shall not be permitted to plead or insist on the statute of limitations:"] And that in the close of the said decree, touching the reservation of costs, should be left out ["is"] and instead thereof should be inserted ["and all further directions are"]. And it was further ORDERED and ADJUDGED, that the said decree, with the addition and variation abovementioned, should be affirmed\*.

DECREE varied. Jour. vol. 25. P. 177.

Sir Darcy Lever, Knt. - - - Appellant. Case 42.

John Andrews, Gent. - - - Respondent.

4th March, 1737.

JOHN Hunt, of Manchester, being in his life-time seised of a messuage with the appurtenances in Manchester, situate in a certain street called the Market-Street Lane, and one barn, with the appurtenances to the said messuage belonging, and three closes in Manchester, lying near and belonging to the said messuage called by the several names of the Great Meadow, the Brick Kiln Meadow, and the field at the back of the house; and afterwards divided into four closes, by the several names of the Great Brick Kiln Meadow, the Little Brick Kiln Meadow, the Kiln Field and the House Field, containing, by estimation, ten acres; did, by indenture, dated the 26th of May, 1612, made between the said John Hunt of the one part, and Robert Lever,

\* A trial at law was accordingly had, and a verdict found in favour of the appellant, for 5257l. 1s. 8d. And the cause being heard on the 21st of February, 1738, upon the equity reserved, the Marquis was decreed to pay this sum to the appellant, with costs, both at law and in equity. Register of Decrees, from Easter, 1735, to Trinity, 1743, p. 297.



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of *Darcy-Lever* in the county of *Lancaster*, clothier, of the other part; in consideration of 120*l.* paid by the said *Robert Lever*, demise to him the said premises, for the term of 21 years from *Michaelmas* then next, under the yearly rent of 20*s.* And some time after making this lease, the said *John Hunt* did, by deed, demise the said premises to the said *Robert Lever* for the term of 100 years, to commence from *Christmas*, 1632, under the yearly rent of 10*s.*

*Robert Lever* being thus possessed of the said premises, soon afterwards died; having first made his will, whereby he gave the premises to his son *John Lever*, the appellant's great grandfather, so long as the said leases should continue.

Soon after the death of *Robert Lever*, the said *John Lever* being entitled to the premises for the said term, purchased the reversion and inheritance thereof from the said *John Hunt*, or some person claiming under him; whereby the said reserved rent, as incident to the reversion, passed along with the inheritance: And accordingly, *John Lever* never after the said purchase, paid the said reserved rent to the said *John Hunt*, his heirs or assigns, or any claiming under him. But one *John Holcroft*, pretending that *John Hunt* had, by indenture dated the 24th of *March*, 1625, conveyed the reversion and inheritance of the said premises to him and his heirs, on his marriage with *Margaret*, the daughter of the said *John Hunt*, set up a claim to the inheritance of the premises; and thereupon there were divers suits and controversies between the said *John Holcroft* and *John Lever*, as appeared by an award under the hand and seal of *John Langley*, bearing date the 24th of *March*, 1626, whereby it was awarded, that all suits between them should cease; and that the said *John Holcroft* should convey and assure the said premises, unto the said *John Lever* and his heirs.

Some time after the death of *John Hunt*, viz. in 1642, *George Hunt*, Gent. claiming the reversion and inheritance of the said premises, expectant on the determination of the said term of 100 years, either as heir at law of *John Hunt*, or by some intail created by him, after his granting the said terms, with remainder to *Edmund Hunt*, brother of the said *George* and



and *John*; the said *John Lever*, in order to strengthen his title, and more effectually to secure to himself and his heirs the said reversion and inheritance, and to take away any pretence of right that might afterwards be set up against his title thereto; agreed to purchase the right and interest of the said *George* and *Edmund Hunt* in the said reversion: And accordingly by a bond, dated the 15th of *August*, 1642, the said *George Hunt* became bound to the said *John Lever* in the sum of 1000*l.* under a condition, that the said *George Hunt* should, at all times, assure, convey and confirm unto the said *John Lever* and his heirs, the said premises with the appurtenances, then-tofore in the tenure and occupation of one *John Hunt*, so as the said *John Lever*, his heirs and assigns, might have and enjoy the freehold thereof for ever; which conveyances and assurances were to be had and done by the said *George Hunt* to the said *John Lever*, his heirs and assigns, either by fine, feoffment, recovery, or by any other lawful ways and means, according to the advice of the counsel learned in the law of the said *John Lever*, and at the costs and charges of him, his heirs and assigns. And by another bond, dated the 19th of the same month, the said *George Hunt* became bound to the said *John Lever* in the penal sum of 1000*l.* under a condition, that the said *George Hunt* should convey and assure to the said *John Lever* and his heirs, in like manner as he had agreed by the condition of the said former bond, the said premises free from all fines, feoffments, sales, statutes, contracts and assurances whatsoever; with some other little variations from the former condition. And some time afterwards, by another bond, dated the 10th of *February*, 1644, the said *Edmund Hunt* became bound to the said *John Lever* in the penal sum of 300*l.* under condition, that the said *John Lever*, his heirs and assigns, should hold and enjoy the said premises, without any let, suit, trouble or disturbance, and free from all incumbrances by or from the said *Edmund Hunt*, or any claiming under him.

*John Lever* having thus contracted with the said *George* and *Edmund Hunt* for the purchase of the reversion and inheritance of the said premises, directed proper conveyances thereof to be made: But in order to prevent the said term of 100 years, which was then in the said *John*, from merging or being lost, as it would have been if the inheritance had been conveyed to him,



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him, it was thought adviseable to take the conveyances of the inheritance in the names of trustees; and therefore the said *John* directed, that they should be taken in the names of *Robert Lever* of *Darcy-Lever*, Gent. and *James Lever* of *Manchester*, clothier, who were near relations of his. And accordingly, by indenture of feoffment, dated the 17th of *December*, 1644, the said *George Hunt*, for the considerations therein mentioned, granted and conveyed to the said *Robert Lever* and *James Lever*, their heirs and assigns, the reversion and inheritance of the said premises; with several covenants for quiet enjoyment, and against incumbrances (except the said lease for 100 years) and for further assurance. And by another indenture of feoffment, dated the 11th of *February*, 1644, the said *Edmund Hunt*, in like manner, granted and conveyed the said premises to the said *Robert Lever* and *James Lever*, their heirs and assigns. And by an indorsement upon each of these deeds respectively, it was mentioned, that the said *John Lever* did consent and agree thereunto, and pay two pence in the name of attornment, to the said *Robert* and *James Lever*.

Some time in 1646, *John Lever* died intestate; whereupon *Katherine* his wife took out letters of administration to him, and afterwards called upon *George* and *Edmund Hunt*, to make further assurance. Accordingly, by indenture tripartite, dated the 6th of *March*, 1646, and made between the said *George Hunt* and *Edmund Hunt* of the first part, the said *Robert* and *James Lever* of the second part, and *Thomas Warburton* and *Richard Warburton* of the third part; *George* and *Edmund Hunt* did covenant and agree, to suffer a common recovery of the said premises to the said *Robert* and *James Lever*, to the uses following; for the strengthening, corroborating and confirming of the before mentioned lease for 100 years; and as to the reversion and inheritance of the said premises, expectant on the determination of that lease, to the use of the said *Robert* and *James Lever*, their heirs and assigns.

Pursuant to this deed, a common recovery, wherein the said *Thomas* and *Richard Warburton* were demandants, the said *Robert Lever* and *James Lever* tenants, and the said *George Hunt* and *Edmund Hunt* vouches, was duly suffered of the said premises; by virtue whereof, and of the several before men-

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tioned purchase deeds, the said *Robert* and *James Lever* became legally seised of the reversion and inheritance of the said premisses, expectant upon the determination of the said term of 100 years, in trust for the heirs of the said *John Lever*, and those claiming under him.

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On the death of *John Lever*, the equitable reversion and inheritance of the premisses descended to *Robert Lever* his eldest son, the appellant's grandfather; but the said *Katherine Lever* held and enjoyed the premisses, and afterwards assigned the same to her younger son *John Lever*, and then devised the same to him by her will; and after her death, he enjoyed the same for his life; the term going all along till the determination of it in a course of administration, disannexed from the inheritance.

On the death of *Robert Lever*, the premisses descended to *John Lever*, his only son and heir, the appellant's father; and upon his death, came to the appellant in that right. But before the determination of the term, there being some suits revived against *John Revel Lever*, the appellant's brother, to whom the said *John* the father had given the premisses; which suits had, for many years, been carried on in the Court of Chancery concerning the inheritance of the said premisses; and the said *John Revel Lever* being informed, that the respondent could give him some light into his family affairs, produced the title deeds to the respondent for that purpose; who finding the same to have been taken in the names of the said *Robert* and *James Lever*, set up a title to the premisses, as heir at law of *Robert Lever*, one of the trustees; who, as he pretended, survived *James Lever*, the other trustee.

The lease of 100 years expired at *Christmas*, 1732; and soon afterwards the respondent, by means of some indirect practices with the tenants, obtained possession of the barn and closes; but not being able to prevail with *Sarah Brearcliffe*, the tenant in possession of the said messuage, to attorn to him, he served her with a declaration in ejectment; but instead of proceeding therein, the respondent, on the 7th of *December*, 1733, exhibited his bill in the Chancery Court held for the county palatine of *Lancaster*, against the said *John Revel Lever* and *Sarah*



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*Brearcliffe*; pretending, that the said *Robert* and *James Lever* were the real purchasors of the premisses, and that he was the heir of the survivor of them; and therefore praying, that he might have an account of the rents and profits of the said premisses, and be let into possession of such part thereof, as the said defendant *Brearcliffe* held and enjoyed.

To this bill the said *John Revel Lever*, on the 28th of February, 1733, put in his answer; and thereby swore, that one *Leigh Page* claiming title to the premisses, under a pretended grant thereof from *John Hunt*, and he being informed that the respondent could give some light into his pedigree, applied to him for that purpose, and produced some abstract of the purchase deeds, or otherwise acquainted the respondent with the same; who, by this accident, having discovered that the deeds were taken in the names of the said *Robert* and *James Lever*, without any trust being expressed in the same, and presuming that the said *John Revel Lever* had no manner of evidence of the said trust, set up his pretended title to the premisses.

Pending this suit, *John Revel Lever* died intestate and without issue; whereupon the premisses descended to the appellant, as his only brother and heir at law, and on the 22d of July, 1734, the appellant exhibited his bill in the said Court against the respondent; praying, that he might have an account of the rents and profits of the said estate, and have the possession and a conveyance thereof in execution of the said trust, and that he might hold and enjoy the same against the respondent and his heirs.

The respondent, by his answer to this bill, admitted that the said *John Revel Lever* applied to him, and made enquiry touching the pedigree of the *Livers*, and that the purchase deeds were then mentioned; but pretended, he knew and was apprised of the said deeds and title before such application was made; but said, he could not set forth when, or by what means he first discovered the purchase deeds, save as aforesaid; and admitted, that he never, to his knowledge, had the purchase deeds, or the deeds, papers and writings relating to the premisses in his custody or possession; and also admitted, that he gave one of the



the tenants 20*l.* and another 4*l.* 10*s.* and thereby got into possession of the said barn and closes.

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Both causes being at issue, and witnesses examined, they came on to be heard in the Dutchy Court of *Lancaster*, on the 24th of *November*, the 6th of *December*, and the 3d of *February*, 1736; when the Court, refusing to permit the award made by the said *Langley* to be read, declared, that the reversion and inheritance of the said premises was not a trust for the appellant, but that it was vested in the respondent and his heirs; and therefore ordered and decreed, that the appellant should account with the respondent, for the rents and profits of the estate received and enjoyed by him since the determination of the said lease for 100 years, and should deliver up possession thereof, with the deeds and writings relating thereto, to the respondent: And it was referred to the Clerk of the Court, or his Deputy, to take an account of what the appellant, or any for his use, had received by the rents and profits for the time aforesaid, which, after a deduction of just allowances, the appellant was to pay to the respondent: And it was ordered, that the appellant's cross bill should be dismissed, and that the respondent should have his costs in both causes, and that the appellant should pay the same.

The appellant, conceiving himself aggrieved by this decree, appealed from it; insisting that it was manifest, his great grandfather agreed with *George* and *Edmund Hunt*, for a conveyance of the reversion and inheritance of the premises, and for that purpose took the said bonds from them: And as on the one hand, it was natural to suppose that a person entitled to so long a term, would be desirous of purchasing the inheritance, and keeping the estate always in his family; so on the other hand, it was absurd to suppose that two strangers, who lived at a great distance from each other, should purchase a dry reversion of an estate, and make themselves joint tenants of it, when neither of them would, probably, live out half the term. That it appeared, from the times of the conveyances of the premises to *Robert* and *James Lever*, that they were, in pursuance of the respective agreements, contained in the conditions of the bonds; and tho' not made to *John Lever*, to whom the said bonds were given, were nevertheless in trust for him and his heirs;

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J. Strange.  
J. Idle.



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heirs; and the only inducement to take the conveyance in the names of trustees, was to prevent the term from merging in the inheritance. That tho' *Katherine*, the widow and administratrix of *John Lever*, had in that right possessed the term, and afterwards assigned, and then devised the same to her younger son; yet, as *John Lever* had not declared the term to be attendant on the inheritance, she might consider it as her right, or as assets to pay debts: Terms in the owner, where the inheritance was in his trustees, having been considered as assets to pay debts; but if he knew that the term ought to go with the inheritance, it amounted only to this, that she designedly concealed her eldest son's title from him. Besides, the conveyances of the inheritance of the premises had never been in the possession of the respondent, or any under whom he claimed; but had all along been in the possession of those claiming under *John*, the devisee of the term, and under whom the appellant claimed.

J. Browne.

N. Fazakerly.

To this it was said on the other side, that the respondent's title arose under deeds of absolute purchase in 1644, in which no trust was mentioned or intimated; but, on the contrary, the purchase money was expressly mentioned to be paid by the respondent's ancestors: And this clear, legal title was endeavoured to be taken away, solely by the pretence of a trust arising above 90 years ago, without any declaration of trust in writing, or the least evidence of payment of the consideration money; but founded merely upon uncertain conjectures, which were not only unsupported by any possession, agreeable to the trust, but contradicted by a long successive possession, inconsistent with it. That if *John Lever*, who was entitled to the term, purchased in the reversion, tho' in another's name, he was then owner of the term and inheritance too; and the term would have been no longer a term in gross, but attendant upon the inheritance, and on his death, the estate ought to have been enjoyed by *Robert*, his eldest son and heir; but instead of that, tho' he died within a year of this pretended purchase of the inheritance, and when the fact, if true, was recent, and could not be forgotten by the family; yet *Katherine*, his widow and administratrix, entered and enjoyed it as a leasehold, and settled it upon her youngest son; and it had ever since been enjoyed



enjoyed as a leasehold only, and by those who could not claim it as an inheritance. That the pretence set up to make it probable, that the inheritance was purchased in trustees names, was, that the term might not be merged; whereas it was more probable, that the term would have been assigned to a trustee, and the inheritance taken in the name of a real purchaser: But this appeared to be a mere pretence; for when *John Lever* died, the term vested, in point of law, in his administratrix, and his heir might safely have taken a limitation of the inheritance, without a merger of the term; and yet the uses of the recovery, which was suffered after *John Lever's* death, were declared to the respondent's ancestors; tho' no account can be given, why their names should be again used as trustees, when the sole reason for it ceased, and when there was no declaration or other writing to manifest the trust.

But several objections were taken to the right claimed by the respondent. I. That the uses of the recovery were first to corroborate the term, and then to the respondent's ancestors in fee. II. That the bonds of the 19th of *August*, 1642, and 10th of *February*, 1644, from *Edmund* and *George Hunt* to *John Lever*, were proofs of his being the real purchaser. III. That it was improbable, that *Robert* and *James Lever* should purchase only a dry reversion, expectant upon so long a term. And IV. that the purchase deeds were in the appellant's hands.

To the first objection it was answered, that the declaring the uses of the recovery in this manner, was not only proper, but necessary, even for the sake of the vendor, who sold to the respondent's ancestors a reversion only; for no use could have been limited of that reversion, without mentioning the particular estate upon which it was expectant. — As to the second objection it was said, that the bonds were, at the most, but proofs that *John Lever* once intended to purchase, but not that he actually did purchase; and their remaining uncanceled and in the appellant's hands, afforded a much stronger proof, that whatever intention or agreement there once was to convey the reversion to *John Lever*, it never was carried into execution; for otherwise, these bonds would have been cancelled or delivered up on the execution of the conveyances; unless it



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was to be imagined, that in this transaction, contrary to the course of business, and even to common prudence, the vendee completed his purchase, without having any thing to shew for it; and that the vendor performed his agreement, without cancelling or taking up his bonds, or having any discharge from them: For the conveyances to the respondent's ancestors neither recited the bonds, nor were a performance of the conditions, but were made to different persons, and different uses; and tho' at this distance of time it was impossible for the respondent to shew upon what occasion these bonds were given, yet neither did the appellant shew how they came to remain uncanceled; and upon the foot of conjecture, there was as much room to imagine, that the name of *John Lever* was made use of in the bonds as a trustee for *Robert* and *James Lever*, as that their names were used in the conveyances in trust for *John Lever*. — To the third objection, it was said to be far from improbable, that both branches of the family might be trying to get this reversion, and that the respondent's ancestors, who were the elder branch, might, as the premises lay convenient and near to the family estate, endeavour to buy the reversion, as a means of buying the term also. But if that argument weighs any thing, the objection is the same to the appellant, as the respondent; for supposing the appellant and his ancestors to have been entitled, yet it was only to a dry reversion, expectant upon the determination of a 100 years term; and it being certain, that the term was constantly enjoyed as a chattel interest, and by the younger branch of the family, it was equally improbable that *John Lever* should purchase the reversion and inheritance for the benefit of the heirs of his family; in whom it was not to take place, otherwise than as a dry reversion, for near the space of 100 years. — And as to the fourth objection, it did not appear how the purchase deeds came into the appellant's hands; but it was probable, that upon the death of *Robert Lever* without issue male, and the appellant's ancestors coming into possession of the bulk of the family estate, the deeds in question might, by mistake or accident, be intermixed with the family deeds, and thereby come into the hands of the appellant's ancestors: For it was plain, that they knew nothing of these deeds, because the appellant's father claimed his estate by collateral descent from the younger branch of his family, which was inconsistent with



with the purchase deeds, and even with the appellant's own title; he deducing the same as heir to the elder branch of his family, in a direct line from *John Lever*, the pretended real purchaser of the reversion.

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AFTER hearing counsel on this appeal, it was DECLARED, that the inheritance of the premises in question, was vested in the respondent, in trust for the appellant and his heirs: And therefore it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondent should, at the charge of the appellant, convey the legal estate of the premises in question, to the appellant and his heirs: And it was further ORDERED, that the respondent should forthwith deliver possession of such part of the premises as was in his possession, or in the possession of any of his under-tenants, to the appellant; and should also deliver to the appellant all deeds and writings in his custody, or power, relating to the premises upon oath; and should come to an account with the appellant before the Clerk of the Court of the Dutchy Chamber of *Lancaster*, or his Deputy, for the rents and profits thereof received by the respondent, or any other person by his order or for his use, and pay to the appellant what should be found due on the said account, after a deduction of all just allowances; and that for the better taking such account, the respondent should be examined on interrogatories, as the said Clerk or his Deputy should direct; and should produce upon oath all books, papers and writings relating thereto: And it was further ORDERED, that the respondent's bill should be dismissed, and that no costs should be paid on either side hitherto; but that the costs of taking the account now directed, and all other subsequent costs, should be reserved till after the said Clerk or his Deputy should have made his report: And it was further ORDERED, that the said Court should give all necessary and proper directions for carrying this order and judgment into due execution.

DECREE  
reversed,  
Jour. vol. 25,  
p. 180.

*Richard*



Case 43. *Richard Ryland, Esq;* - - Appellant.

*James Roch Green and Barry Colles,*  
*Executors of Benjamin Green, and*  
*John Fitzgerald Executor of Edward*  
*Fitzgerald,* - - Respondents.

3d May, 1738.

**B**Y an act of Parliament made in *Ireland*, 2<sup>o</sup> Ann. it was, amongst other things, enacted, that every papist, or person professing the popish religion, should, from and after the 24th day of *March*, 1703, be disabled and made incapable to buy and purchase, either in his or their own name, or in the name of any other person or persons, for his or her use, or in trust for him or her, any manors, lands, tenements, or hereditaments, or any rents or profits out of the same, or any leases or terms thereof, other than any term of years, not exceeding thirty one years, whereon a rent not less than two thirds of the improved yearly value at the time of the making such lease of the tenements leased, should be reserved and made payable during such term: And that all and singular estates, terms, or any other interest or profits whatsoever, other than such leases, not exceeding thirty one years as aforesaid, of, in, or out of such lands, tenements, or hereditaments, from and after the said 24th day of *March*, to be bought and purchased by or for the use or behoof of any such papist, or person or persons professing the popish religion, or upon any trust or confidence, mediately or immediately, to or for the benefit, use, or advantage of any such person or persons professing the popish religion; should be utterly void and of none effect to all intents, constructions and purposes whatsoever.

And by another act of Parliament, made in that kingdom in the 8th year of the same reign, reciting the former act; it was further provided and enacted, that all such lands, tenements and hereditaments, conveyed or leased, or to be conveyed or leased, to any papist, or person professing the popish religion; or to the use of, or in trust for any papist, or person professing the popish



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popish religion, contrary to the true intent and meaning of the said acts; and all collateral securities as were or should be made or entered into, to cover, support, secure or make good the same, should and might be sued for by any protestant or protestants, by his or her or their proper action, real, personal, or mixt, founded on the said acts, in any of her Majesty's Courts of law, or in any Court of Equity, if the nature of the case should require it; and the plaintiff or demandant in such suit, upon proof that such purchase or lease was made in trust for any papist, or person professing the popish religion; or under any confidence to or for any papist, or person professing the popish religion; or for his, her, or their benefit or advantage, by receiving the rents, issues, or profits thereof, or otherwise should obtain a verdict and judgment, or a decree thereupon, and should recover the same, and have execution to be put into the seisin and possession thereof; to hold and enjoy such lands, tenements and hereditaments, according to the estate, use, trust, interest, or confidence, which such papist, or person professing the popish religion had, or should have had therein, had he, she, or they been qualified to purchase, hold, or enjoy the same; subject nevertheless, to all such rents, covenants and conditions, reservations and incumbrances whatsoever, as the same would have been subject to in the hands of such papist, or in the hands of such person to whom the same were sold or leased, in trust for such papist, or person professing the popish religion, or to his, her, or their use, benefit, or behoof.

*Benjamin Green*, deceased, on the 4th of *February*, 1731, exhibited a bill in the Court of Exchequer in *Ireland*, against *Edward Fitzgerald*, the appellant, and others; setting forth, that one *Michael Murphy*, being seised in fee simple of the town and lands of *Williamstowne*, in the county of *Waterford*, and having mortgaged the same to one *Edward Brown*; did afterwards execute an absolute conveyance of the equity of redemption thereof to the said *Edward Fitzgerald*, and his heirs, in consideration of 2200*l*. But that the said *Edward Fitzgerald*, being then and always a papist, was precluded and disabled from enjoying the benefit of the purchase by the said statutes. And that the estate or interest meant, or intended to be sold and conveyed to him as aforesaid, was null and void in respect of himself, and subsisted only for the use and advantage



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of a protestant discoverer or informer, as a forfeiture granted to him by virtue of the last mentioned act: But it was thereby further suggested, that in order to protect and secure the purchase which the said *Edward Fitzgerald* had so made, and to elude the several disabilities and incapacities laid upon him by the said statutes; the appellant had been prevailed upon to exhibit a bill in the Court of Chancery in the said kingdom, against the said *Edward Fitzgerald* and others, claiming the whole benefit and advantage of the said purchase, and also of the mortgage (which was charged to have since come to and vested in the said *Edward Fitzgerald*) as the first protestant discoverer entitled thereto under the said act of Parliament: But that such bill was exhibited only in trust for the said *Edward Fitzgerald*; and that the same, or any recovery or other subsequent proceedings thereupon, could not be any bar to the said *Benjamin Green*, but that he ought, notwithstanding, to be looked upon as the first true and real protestant discoverer; and therefore the said *Benjamin Green*, by his bill, prayed to be decreed to the said lands, or to such interest therein as was intended for the said *Edward Fitzgerald*, or the said mortgagee, who were both alledged to be papists.

After the appellant and the said *Edward Fitzgerald*, and the other parties, had severally put in their answers, and thereby fully denied all the material allegations of this bill; the said *Benjamin Green*, pursuant to an order of the 18th of May, 1732, exhibited a supplemental bill against the appellant and the said other parties; suggesting, that since the time of his exhibiting his original bill, he had made further discoveries of several facts and circumstances, tending, as he alledged, to a further manifestation of the supposed trust between the appellant and the said *Edward Fitzgerald*; and which he therein disclosed and set forth at large. But before all the parties could put in answers thereto, the said *Benjamin Green* died; having in his last illness made his will, and thereby devised to his son, the respondent *James Roch Green*, all the benefit of the said discovery, and likewise of all the past and future proceedings of the said information, and of the decree to be pronounced thereupon; and thereof appointed the respondents *Green* and *Colles* executors.

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The executors having proved the will, exhibited a bill of revivor against the appellant and the said *Edward Fitzgerald*, and the other parties; praying, that the said several bills and the proceedings had thereon respectively, might be revived and stand in the same plight and condition in their names, as the same stood at the time of their said testator's death; and that they might be admitted to prosecute the said suits in their own names, and have the same benefit as the said *Benjamin Green* would have had were he then living; and that such of the defendants as had not answered the said supplemental bill, might answer the same.

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To this bill of revivor the appellant put in a demurrer; and for cause of demurrer shewed, that by the rules of law or equity, no bill of revivor did lie, or could regularly be brought in this, or any such like popular suit or information; and for that, if any such bill did lie, yet in regard the interest thereby demanded was in the nature of an inheritance, and that neither of the complainants claimed the same as heir at law, but only by a devise, and in a course of executorship, they were not as such, entitled to have exhibited or maintained any bill of revivor.

This demurrer came on to be argued on the 8th of *July*, 1734, before the Chancellor, Treasurer, Lord Chief Baron, and other Barons of the said Court of Exchequer; and on the next day, they were pleased to order, that the same should stand over-ruled with costs.

The appellant therefore appealed from this order, contending, that where by any penal statute a forfeiture is annexed to that which was no offence before, and the right of suing for it is given to any common informer, no transmissible interest, estate, or title, can vest in him, before judgment is first obtained for recovery thereof. That in the present instance, the first discoverer could only be considered as a common informer, since he had barely a right of action given him by the above mentioned penal statutes; but if any such estate or interest had devolved upon the respondents *Colles* and *Green*, by virtue of the devise in *Green's* will, they ought to have entitled themselves thereto by an original bill, and not by a bill of revivor, which cannot regularly be exhibited by a devisee.

N. Fazaker-  
ly.  
W. Murray.

To



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D. Ryder.

J. Strange.

To this it was answered, that by the aforesaid acts of Parliament, *Benjamin Green*, the first protestant discoverer, became entitled to the rents and profits of the estate, from the time of filing his bill, which must therefore go to his devisee, or representative, after his death; and whatever interest vested in him, it was in his power to dispose of by his will, tho' he had not the actual possession. That as this estate was to be considered as an interest vested in *Benjamin Green* on filing his bill, it was apprehended, that the respondent *James Green* was well entitled to it by descent from his father, to whom he had shewn himself to be son and heir, altho' he should not be so entitled as devisee; and the title of *Green's* executors was good as to the rents and profits of the estate which accrued in his life-time, and which therefore entitled them to revive the former suit. And that tho' a devisee cannot, as such, bring a bill of revivor, because that is confined to the representative of the plaintiff; yet he may bring a bill in the nature of a bill of revivor, to have the benefit of the former proceedings. It was therefore hoped, that the order for over-ruling the demurrer, would be affirmed, with costs.

ORDER  
reversed,  
Jour. vol. 25.  
P. 239.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be reversed, and that the demurrer should be allowed; without prejudice to the respondents *Green* and *Colles*, or either of them, bringing an original bill for the premisses in question, as protestant discoverers in their own right, as they should be advised.

Between



Between *Samuel Berington*, on  
the demise of *John Dormer*,  
Esq; — } Plaintiff

Case 441

*John Parkhurst*, Esq; and *Ri-  
carda* his Wife, *Sir John  
Fortescue Aland*, and Dame  
*Elizabeth* his Wife, and *Ca-  
therine Dormer*, Spinster,  
and Others, — } Defendants

in Error.

16th May, 1738.

*JOHN Dormer*, Esq; having three sons and two brothers  
living, and two nephews, the sons of a deceased brother;  
and being desirous to settle the ancient family estate in the males  
of his name and blood, in case there should be no issue male of  
his own sons; did, upon the marriage of his eldest son, *Sir  
John Dormer*, Bart. with *Susanna*, one of the daughters and  
coheirs of *Sir Richard Brawne*, and in consideration thereof,  
and of 5000*l.* the marriage portion, by indenture of feoffment,  
dated the 13th of *August*, 1662, made between the said *John  
Dormer*, and *Sir John Dormer* his son and heir apparent, of the  
first part, the said *Susanna Brawne* of the second part, *Sir Ro-  
bert Jenkinson* and *Sir William Child*, of the third part, and  
*John Cave* and *Thomas Marriett*, of the fourth part; limit,  
settle and convey (amongst other lands) the manor of *Skipton-  
Lee* and *Lee-Grange*, and divers lands, tenements and heredita-  
ments, the estate and inheritance of the said *John Dormer* and  
*Sir John Dormer*, or one of them, in the county of *Bucks*,  
(subject to an estate in part of the premises, to the said *John  
Dormer*, the father, for life) to trustees and their heirs, to the  
uses following; viz. to the use of the said *Sir John Dormer*,  
and his assigns, for 99 years, if he should so long live; with  
remainder to trustees to preserve contingent remainders; re-  
mainder to the first and other sons of the said marriage, in tail  
successively; remainder, as to part of the premises, to the  
trustees for 99 years, for raising daughters portions; remainder,

Strange 1086.  
Viner, vol.  
13. p. 292.  
ca. 23.  
*Andr. 125.*



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as to all the premisses, to the first and other sons of the said Sir *John Dormer*, by any other wife, in tail male successively; remainder to *Robert Dormer*, second son of the said *John Dormer*, (afterwards one of the Justices of the Court of Common Pleas) for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Robert*, in tail male successively; remainder to *Fleetwood Dormer*, third son of the said *John Dormer*, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Fleetwood*, in tail mail successively; remainder to the said *John Dormer*, and the heirs male of his body; remainder to *Peter Dormer*, brother of the said *John Dormer*, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Peter*, in tail male successively; remainder to *Fleetwood Dormer*, afterwards Sir *Fleetwood Dormer*, another brother of the said *John Dormer*, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Fleetwood*, in tail male successively; remainder to *Bennet Dormer*, who was the eldest son of *Euseby Dormer*, deceased, another brother of the said *John Dormer*, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Bennet Dormer*, in tail male successively; remainder to *Euseby Dormer*, second son of the said *Euseby Dormer*, and father of the lessor of the plaintiff, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Euseby*, in tail male successively; remainder to the heirs of the body of the said *John Dormer*; remainder to the right heirs of the said *John Dormer*.

There was issue of this marriage one son, afterwards Sir *William Dormer*, and one daughter, *Susanna*, who married *Francis Sheldon*, Esq; and by whom she had several children, who enjoyed other parts of the family estate, as heirs general of *John Dormer*, who made the settlement.



It happened, that the several successive limitations in this settlement, precedent to the estate limited to *Euseby Dormer*, the nephew, determined in his life-time, by the deaths of all the prior remainder-men without issue male; the last of such estates which subsisted, being the term of 99 years, vested in Mr. Justice *Dormer*; who died without any issue.

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*John Dormer*, the lessor of the plaintiff and eldest son of the said *Euseby Dormer*, who was forced to litigate three years in the Court of Chancery, to obtain a discovery of the settlement, of which there were no less than three duplicates in the hands of the defendants, who used all manner of dilatories to avoid producing it; being advised, that upon the death of his father, which happened on the 3d of *September* 1729, he was become seised of an estate tail in the premises, by virtue of the said settlement; did, in *Michaelmas* term, 1731, cause declarations in ejectment to be delivered to *John Parkhurst*, Esq; and Sir *John Fortescue Aland*, Knt. and *Catherine Dormer*, and their tenants, for the manor of *Skipton-Lee* and *Lee-Grange*, and divers messuages, lands and tenements, and also 5s. rent and view of frank-pledge, with the appurtenances, lying in *Skipton*, *Lee-Grange* and *Quainton*, in the county of *Bucks*; and also of all manner of tithes growing and renewing in *Skipton-Lee*; and in *Hilary* term following, the said *John Parkhurst* and his wife, Sir *John Fortescue Aland* and his wife, and *Catherine Dormer*, and their tenants, made themselves defendants, and entered into the common rule for confessing lease, entry and ouster; and issue was thereupon joined.

In *Michaelmas* term, 1735, the cause came on to be tried at the bar of the Court of King's Bench, by a special jury of the county of *Bucks*; when the jurors found, that as to the tithes, rent and view of frank-pledge, in the declaration specified, the defendants were not guilty: And as to the trespass and ejectment in the manor, and the residue of the tenements and premises in the declaration specified; they found a special verdict to the following effect; viz.

" That on the 13th of *August*, 1662, *John Dormer*, Esq; and  
 " Sir *John Dormer*, being seised of the premises in the declaration,  
 " tion, in fee, made such deed of settlement thereof, as is above  
 " set



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“ set forth ; and that livery of seisin and possession of the pre-  
 “ misses, was made to the trustees in due form of law.

“ That by virtue of the said feoffment and livery of seisin, the  
 “ said trustees afterwards, on the said 13th of *August*, 1662,  
 “ entered upon and were seised of the premises ; and that after  
 “ making the said settlement, viz. on the 1st day of *October*,  
 “ 1662, a marriage was solemnized between the said Sir *John*  
 “ *Dormer* and *Susannab*.

“ That in *Michaelmas* term, in the 14th year of King  
 “ *Charles II.* a common recovery was duly suffered of the  
 “ premises, to the uses in the said feoffment ; and that by  
 “ virtue of the said feoffment, livery of seisin and recovery,  
 “ the said Sir *John Dormer*, on the 1st day of *December*, 1662,  
 “ entered into and was possessed of so much of the premises, as  
 “ were limited to him for the term of 99 years, if he so long  
 “ lived. And that the said *John Dormer*, Esq; afterwards, and  
 “ before the said marriage, entered and was seised of so much  
 “ of the said premises as were limited to him for the term of  
 “ his life.

“ That on the 1st of *September*, 1670, the said *Susanna Dor-*  
 “ *mer* died ; and that on the 23d of *September*, 1675, Sir *John*  
 “ *Dormer* also died ; and that he left issue by the said *Susanna*,  
 “ Sir *William Dormer*, Bart. his only son and heir at law, who  
 “ attained his age of 21 ; and that on the 23d of *September*,  
 “ 1675, the said Sir *William* entered into the premises so  
 “ limited to the said Sir *John Dormer* his father, for 99 years,  
 “ if he so long lived, and was seised thereof in fee tail.

“ That on the 1st of *October*, 1679, *John Dormer*, Esq; also  
 “ died, seised of such his estate in the residue of the premises ;  
 “ and left the said Sir *William Dormer*, his grandson, the heir  
 “ male of his body, and also his heir at law ; and that, on the  
 “ 2d of *October*, 1679, the said Sir *William Dormer* entered into  
 “ all the premises whereof the said *John Dormer*, his grand-  
 “ father, died seised, and was seised thereof as of fee tail ; and  
 “ thereby became seised of all the premises in the declaration  
 “ specified.

“ That



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“ That *John Dormer*, Esq; had three sons; viz. Sir *John Dormer*, *Robert Dormer* and *Fleetwood Dormer*, in the said indenture of feoffment named; and that after the death of Sir *John Dormer*, and in the life-time of Sir *William Dormer*, viz. on the 22d of *October*, 1723, the said *Fleetwood Dormer* died, without issue male; and that on the 10th of *September*, 1678, *Peter Dormer*, in the said indenture of feoffment named, one of the brothers of the said *John Dormer*, Esq; died without issue male: And that on the 16th of *September*, 1696, *Fleetwood Dormer*, also named in the said feoffment, and another brother of the said *John Dormer*, Esq; died without issue male: And that on the 1st of *November*, 1680, *Bennet Dormer*, Esq; named in the said settlement, and one of the sons of *Euseby Dormer*, deceased, (which said *Euseby* was one of the brothers of *John Dormer*, Esq;) died without issue male; and that on the 9th of *March*, 1725, Sir *William Dormer* died seised of the premises, without issue male.

“ That after Sir *William Dormer*'s death; viz. on the 9th of *March*, 1725, *Robert Dormer* entered upon the said premises, and was possessed thereof for the term of 99 years, if he so long lived; and had issue male *Fleetwood Dormer* his only son: And that in *Easter* term, in the 12th year of King *George I.* a fine, with proclamations, was levied of the premises, between *Dormer Parkhurst*, Esq; and *John Parkhurst*, jun. Esq; and the said *Robert Dormer* and *Fleetwood* his son; and that in the same *Easter* term, a common recovery was also suffered of the premises by the said *Robert* and *Fleetwood*, with double voucher.

“ That on the 22d of *June*, 1726, *Fleetwood Dormer*, the son, died without issue male, and that the said *Robert Dormer*, the father, survived him; and afterwards, on the 16th of *September*, 1726, the said *Robert Dormer*, the father, died without issue male, and left issue four daughters; viz. *Mary Dormer*, Dame *Elizabeth*, wife of the said Sir *John Fortescue Aland*, *Ricarda* the wife of the said *John Parkhurst*, and the said *Katherine Dormer*; and that after the death of the said *Robert Dormer*, the said Sir *John Fortescue Aland* and *Elizabeth* his wife, the said *John Parkhurst* and *Ricarda* his wife, and the said *Catherine Dormer*, entered into the premises and received the profits thereof; and afterwards in *Easter* term, 1730, levied a fine with proclamations of the said premises.



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“ That on the 3d of *September*, 1729, *Euseby Dormer*, the  
 “ nephew of the said *John Dormer*, Esq; died, leaving issue  
 “ male of his body *John Dormer*, the lessor of the plaintiff; and  
 “ that before the death of the said last mentioned *Euseby Dormer*,  
 “ the said term of 99 years, by the said feoffment limited for raising  
 “ daughters portions, was duly surrendered and extinguished.”

That on the 10th of *September*, 1731, the said *John Dormer*,  
 “ the lessor of the plaintiff, entered into the premises, with  
 “ intent to make the demise in the declaration mentioned, to  
 “ the said *Samuel Berington*, in order to enable the said *Bering-*  
 “ *ton* to bring this action of ejectment, *but did not then make*  
 “ *an actual entry for the purpose of avoiding the said fines*; and  
 “ thereupon the said *John Dormer*, the lessor, became seised  
 “ thereof, as the law requires; and being so seised, he after-  
 “ wards demised the premises to the said *Berington*, as in the  
 “ declaration stated.”

“ That the said *John Dormer*, the lessor of the plaintiff, made  
 “ three several actual entries upon the said premises, claiming  
 “ title thereto; viz. the first entry on the 6th of *January*, 1731,  
 “ the second on the 6th of *October*, 1732, and the third entry  
 “ on the 5th of *October*, 1733.”

The occasion of finding this special verdict was, that upon the trial, two points were insisted upon for the defendants: I. That the remainder limited by the settlement, under which the lessor of the plaintiff claimed, was barred by the fine levied by *Robert Dormer* and *Fleetwood* his son, and the recovery suffered by *Fleetwood* the son in 1726. II. That tho' the plaintiff should not be barred by this fine and recovery, yet by it, and by the fine of the daughters of *Robert Dormer* in 1730, all persons who were out of possession, were barred, until an actual entry made, or at least so dispossessed, that they could not bring an ejectment; and in this case, the actual entry found, was subsequent in time, to the demise in the declaration, and therefore void; in regard that by law, no person can make a good lease, who is out of possession.

In *Hilary* term, 1736, and in *Hilary* term, 1737, this special verdict was argued in the Court of King's Bench; and tho' both the above points were spoke to by the counsel, yet, as the defen-



defendants were entitled to judgment, if the Court should be of opinion with them upon either point; and the Court being unanimously of opinion, that an actual entry was necessary to be made by the lessor of the plaintiff, before the 1st of *October*, 1731, the date of the demise, and no such entry having been made; the Court, therefore, gave judgment for the defendants upon that point, without determining the other.

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To reverse this judgment, a writ of error was brought in Parliament; and on behalf of the plaintiff in error it was insisted, that the lessor of the plaintiff, upon the death of *Euseby Dormer* his father on the 3d of *September*, 1729, became seised of an estate tail in possession in the premises in question; and was therefore at liberty to lay the fictitious demise in the declaration, at any time after his right accrued. That the defendants were no ways entitled to any estate in the premises, by virtue of the said settlement; and that the lessor of the plaintiff was neither party or privy to the fine levied by them in *Easter* term, 1730, after his right to the premises accrued; nor could he be presumed to be cognizant of the time of levying it. That his title to an estate tail in the premises, was clearly found by the special verdict; the several intermediate remainder-men between him and *John Dormer*, Esq; who made the settlement, appearing upon the record to have severally died without leaving any issue male of their respective bodies. That a fine with proclamations does not, by force of the statute 4 *Henry VII.* operate as a bar to conclude strangers, till after five years elapse without entry or action; and therefore the verdict having found, that the lessor of the plaintiff made his first actual entry on the 6th of *January*, 1731, and before the declaration in his action, he thereby avoided the operation of the fine, and was at liberty to lay the demise in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued; in the same manner, as if his title had stood independent of such fine, so rendered ineffectual within the plain intent of the statute: And if such entry was not good to maintain this demise, it must follow, that in every case where a fine is levied by a wrong doer, and not discovered till two, three, or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely

F. Chute.

H. Legge.



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lutely lost; tho' the statute gives five years to enter, and an entry at any time within the five years, purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes.

D. Ryder.

J. Strange.

On the other side it was said, that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were apprehended to be of no use in the present case; for the ejectment lease being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in the statute 4 Hen. VII. has always been understood to mean *real actions*, which were then in use; and it has often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

It is, however, objected, that *Robert Dormer* being only tenant for years, and the freehold being limited to trustees for his life, to support the contingent uses, with remainder to his first and other sons in tail male; the fine levied by *Robert* and *Fleetwood*, who was the next remainder-man in tail, was void, or at least no freehold passed thereby; and consequently, the recovery suffered by *Fleetwood*, the son of *Robert*, was also void, for want of good tenants to the precipe, it being necessary they should be tenants of the freehold.

But this objection depends upon a supposition, that there was then an estate of freehold in the trustees; and is besides, a very unfavourable objection, because the remainder-man in tail, for whose benefit they were made trustees, joined in the fine and recovery. It is apprehended, that the freehold was then in *Fleetwood*, the son of *Robert Dormer*, and not in the trustees: The words of the settlement are, *and from and after the death of the said Robert Dormer, or other sooner determination* of



of the estate limited to him for 99 years as aforesaid, then to the use and behoof of the trustees and their heirs, for and during the natural life of the said Robert Dormer\*. Now, taking all the words together, they are so absurd, that they cannot be of any effect; but taking them distributively, in the first place, the limitation is *from and after the death of Robert, to the trustees for the life of Robert*, which is impossible; In the next place, suppose the words *from and after the death of Robert*, were to be rejected, then it would rest upon the words, *or other sooner determination of the estate limited to him for 99 years*: And then, as it was quite uncertain, whether that term of 99 years would determine before the death of *Robert*, the limitation to the trustees would, at the most, be but a contingent one; and if so, then as *Fleetwood*, the next remainder-man, was in being at the death of *Sir William Dormer*, his became a vested remainder, and he had thereby an estate of freehold to enable him to make good tenants to the precipe. But there was no reason to construe this limitation so favourably; for though the ancient method was, to limit an estate for years to the father, determinable on his death, then to trustees for the life of the father, to support the contingent uses; and then to the first and other sons of the father in tail; yet that method tended so much to perpetuities, which are odious in the law, and was found so inconvenient, that the constant method now is, to limit an estate to the father for life; and had the limitation been so in the present case, there could have been no doubt, but the recovery had been well suffered. Besides, the present limitation cannot, by any rule of construction whatever, be extended beyond the words of it; and if so, the recovery was well suffered, and the right of the lessor of the plaintiff barred. And in this case, the daughters of *Robert Dormer*, in whose favour the judgment has been given, were the granddaughters of *John Dormer* who made the settlement, and the heirs also of *Robert* and of *Fleetwood*, the tenant in tail; whereas the lessor of the plaintiff was only a collateral relation, and the most remote remainder-man in the deed.

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\* A subsequent and very material question between these parties arose upon this limitation, and was twice solemnly determined in favour of the present plaintiff in error. As will appear in the course of this volume. *See post. 405.*



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JUDGMENT  
affirmed,  
Jour. vol. 25.  
p. 257.

AFTER hearing counsel on this writ of error, and the unanimous opinion of the Judges being delivered upon certain points of law to them proposed; \* it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, should be affirmed; and that the record should be remitted. And it was further ORDERED, that the plaintiff in error should pay to the defendants in error 10*l.* for their costs.

Case 45.

*John Kent, Gent. and James May, Esq;* } Plaintiffs

*Robert Whitby, Esq; and Katherine his Wife,* } Defendants

in Error.

12th March, 1738.

THE defendant *Katherine*, who was the widow and relict of *John Kent*, deceased, did, in Michaelmas term, 1726, bring in the Court of Common Pleas in Ireland, a writ of dower against *Edward May, Esq;* and *Robert Kent, Gent.* thereby demanding her thirds of certain messuages, lands, tenements and hereditaments in the county of *Kilkenny*, which were the freehold and inheritance of the said *John Kent*, her late husband.

The said *Edward May* and *Robert Kent* having obtained leave from the Court to plead double, each of them put in two several pleas to the following effect: The first, that the said *John Kent* was never seised of such an estate in the said lands and tenements, that the said *Katherine* could be thereof endowed: And the parties joined issue upon that fact. Their second plea was, that the said *Katherine*, on the 1st of May, 1721,

\* It appears from Sir *John Strange's* Report of this case, that the questions put to the Judges were, 1st. Whether an actual entry was necessary to avoid the fine? 2d. Whether the demise being laid before the time of the first entry, this ejectment could be maintained. To the first question, they answered in the affirmative. To the second, in the negative.

*According to an inform<sup>t</sup> in M<sup>ss</sup>. on my cases of Appeals there was a 3<sup>d</sup> q<sup>u</sup> by*



by subtil means, secret insinuations and delusions, threats and menaces, persuaded and procured the said *John Kent*, her late husband, and the eldest son and heir apparent of *John Kent* the elder, to contract matrimony with her, without the privity or consent of the said *John Kent*, the elder, who was then alive, and had lands and tenements in fee simple of the yearly value of 50*l.* and that the said *John Kent*, formerly the husband of the said *Katherine*, was then of the age of 18, and no more, and never had any guardian, except his father; and that neither the Lord Chancellor of *Ireland*, nor the Keeper of the Great Seal of *Ireland*, for the time being, consented to the said marriage.

The defendant *Katherine* replied to the second plea, that she did not by subtil means, secret insinuations and delusions, threats and menaces, persuade or procure the said *John Kent*, formerly her husband, to contract matrimony with her, without the privity and consent of the said *John Kent* the elder, his father. And upon this, issue was joined.

Both the issues were tried at the Lent Assizes held for the county of *Kilkenny*, on the 18th of *March*, 1727. And as to the first, the jury found, that the said *John Kent*, the younger, on the 6th of *February*, 1725, died seised in fee simple of two thirds (the whole into three parts to be divided) of certain messuages, lands, tenements and hereditaments set forth in the verdict, and that the third part of the said two thirds was of the yearly value of 79*l.* 5*s.* 9*d.* And as to the second plea, the jury found a special verdict to this effect; that the said *Katherine* contracted matrimony with the said *John Kent*, her late husband, without the privity or consent of the said *John Kent*, the elder, his father, and that the said *John Kent*, the younger, at the time of the said marriage, was under the age of 21 years, and the eldest son and heir apparent of the said *John Kent*, the elder, and that the said *John Kent*, the elder, at the time of the said marriage, was seised of lands in fee simple of the yearly value of 50*l.* and upwards; but that the said *Katherine* did not persuade or procure the said *John Kent*, the younger, to contract matrimony with her by subtil means, or secret insinuations, delusions, threats or menaces.

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The Court, in *Michaelmas* term, 1727, after several arguments, were of opinion, that the said *Katherine* was entitled to her dower; and accordingly gave judgment, that she should recover against the said *Edward May* and *Robert Kent*, as well seisin of the said third part of two thirds of the said messuages, lands, tenements and hereditaments, situate and being in the said county of *Kilkenny*; as also the value of the said third part, from the death of her said husband *John Kent*, which amounted to 143*l.* 7*s.* 4½*d.* and also her costs.

In *Hilary* term following, the said *Edward May* and *Robert Kent* brought a writ of error in the Court of King's Bench in *Ireland*, and assigned general errors; and after several continuances, the said *Katherine*, in *Trinity* term, 1729, suggested, that the said *Edward May*, one of the plaintiffs in error, was dead, whereby the said writ of error abated; and that *James May*, Esq; was his son and heir, and she took out a *scire facias* against the said *Robert Kent* and *James May* to revive the said judgment, and have the benefit thereof.

In *Michaelmas* term, 1729, the said *Robert Kent* and *James May* appeared, and prayed time till *Hilary* term then next, to take out a writ of error *quod coram vobis residet*; which being granted, they sued out a writ of error accordingly; and in *Michaelmas* term, 1730, the Court of King's Bench affirmed the judgment of the Court of Common Pleas, and awarded a writ of seisin of the said dower; and that the defendant *Katherine* should have execution as well for the sum mentioned in the said judgment, as for the value of her said thirds, from the time of giving the said judgment, which amounted to 312*l.* 12*s.* 9½*d.* and 35*l.* 4*s.* 6*d.* for her costs.

Whereupon in *Hilary* term following, the said *James May* and *Robert Kent* brought a writ of error in the Court of King's Bench in *England*; and after several arguments, the judgment of the Common Pleas in *Ireland*, and the affirmance thereof in the Court of King's Bench in that kingdom, and the award of the writ of seisin of the said dower, were affirmed in *Easter* term, 1733; but the rest of the said judgment was reversed, which no ways affected the merits, or the right of the said *Katherine* to her dower; and the Court ordered, that the record should



should be remitted to the King's Bench in *Ireland*, and that the Judges of that Court should issue a writ of inquiry, to inquire of the value of the said dower, from the time of the said judgment of the Court of Common Pleas in *Ireland*, to the affirmance thereof in the King's Bench in that kingdom.

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On the 22d of *November*, 1732, the said *Robert Kent* and *James May* sued out a writ of error, returnable in Parliament, and assigned the general errors, and the said *Katherine* joined in error; but on the 23d day of *May* following, and before the cause could be brought to a hearing, the said *Robert Kent* died; whereupon it was ordered by the House, on the 2d of *May*, 1735, that the record should be remitted to *Ireland*, unless the surviving plaintiff in error, and the representative of the said *Robert Kent*, brought a new writ of error within two days of the then next session.

Jour. vol. 24.  
P. 540.

In *January*, 1735, the said *James May*, the surviving plaintiff in error, preferred a petition to the House for enlarging the time for bringing a new writ of error; which was referred to the consideration of a committee. But before any report could be made, the said *James May* died, whereby the said writ of error abated, and the House, on the 26th of *January*, 1735, were pleased to order that the record should be remitted to the Court of King's Bench in *Ireland*.

— 578.

In *Michaelmas* term, 1736, the said *Robert Whitby* and *Katherine* his wife alledged their marriage; and that *John Kent* was the son and heir of the said *Robert Kent*, deceased, and that *James May* was the son and heir of the said *James May*, deceased; and on the 28th of *November*, 1736, they took out a *scire facias* against the said *John Kent* and *James May*, whereupon the Sheriff returned a *scire feci* as to *James May*, and a *nihil et non est inventus* as to the said *John Kent*.

On the 12th of *February* following, a second *scire facias* issued, returnable in *Easter* term then next; whereupon the Sheriff made the like return as before; and the said *John Kent* and *James May* having made default, the Court of King's Bench in *Ireland*, in *Easter* term, 1737, gave judgment that the said *Robert Whitby* and *Katherine* his wife, should have seisin of



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her said dower ; and they awarded a writ of inquiry, to see how much the same amounted to, from the time of the said judgment in the Court of Common Pleas in *Ireland*, to the affirmation thereof in the King's Bench in the said kingdom.

Jour. vol. 25.  
p. 204.

Upon this judgment, the said *John Kent* and *James May* brought a writ of error in Parliament, which, on the 30th of *March*, 1738, was declared to be null and void, and the same was ordered to be quashed ; because the record could not be removed into Parliament, without passing through the Court of King's Bench in *England*.

A writ of error was accordingly brought, returnable in that Court ; and in *Michaelmas* term, 1738, the judgment of the Court of King's Bench in *Ireland* was there affirmed.

D. Ryder.

J. Strange.

The proceedings being now regular, a new writ of error was brought in Parliament ; and on behalf of the plaintiffs it was said, that by an act of Parliament made in *Ireland*, 6 *Ann.* intitled, *An act for the more effectual preventing the taking away and marrying children against the will of their parents or guardians* ; it was, *inter alia*, enacted, “ That if any person or persons shall, at any time after the 1st day of *November*, 1707, “ by any subtil means, or secret insinuations and delusions, “ threats or menaces, persuade or procure the son and heir “ apparent, or other son of any person or persons having lands, “ tenements or hereditaments, of the yearly value of 50*l.* or “ personal estate of the value of 500*l.* or shall, in manner aforesaid, persuade or procure the eldest son, or any other son “ of any person deceased, to contract matrimony, without the “ privity or consent of the parents or guardians of such eldest “ or other son, and such matrimony be had as aforesaid, before “ such son attain the age of 21 years ; every such person or persons, contracting matrimony without the privity and consent “ of such parent or guardian, and in case there be no parent “ or guardian appointed, of the Lord Chancellor, Lord Keeper, “ or Commissioners of the Great Seal, for the time being, shall “ be, and is hereby rendered incapable, and for ever disabled “ to sue for, recover or demand any dower, thirds, or any other “ part of the real or personal estate of such son or sons, or claim “ or demand any jointure, or other provision out of the real “ or



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“or personal estate of such son or sons, made to or in trust for her, by any will, deed or settlement whatsoever.” And it was insisted, that notwithstanding the manner in which the special verdict was found, the defendant *Katherine* would be barred of her dower by virtue of this statute. For it was a remedial law, and ought to receive such a construction, as would extend the remedy and prevent the mischief; and tho’ for form’s sake in pleading, it was necessary to pursue the words of the statute, and alledge that the private marriage was procured by subtil means, &c. yet it seemed evident, that the Legislature intended they should be presumed from the private marriage, without the father’s consent, and not otherwise to be proved; because the accessaries, who only could be supposed to have knowledge of the evil practices used to ensnare, were, by the act, subject to three years imprisonment, and could not, therefore, be examined. That the private marriage of the heir within the age of 21, without the father’s consent, and entitled to such a fortune as the law requires, being expressly found by the jury; the subtil means, &c. by which it was procured, were included and virtually found in the affirmative; and consequently, the negative part of the verdict must be rejected, as repugnant to the affirmative. That if the negative part of this verdict should prevail, it would be opening a door to elude the statute, by an accomplice only swearing, that the clandestine marriage was of the young man’s own seeking and desire: On the other hand, if the negative part should be rejected, the law would be truly remedial; it would answer the end declared in its title, and parents might then hope to preserve their children from the great mischiefs which usually attend such imprudent marriages, when the temptation of dower is removed. That the word *such* in the act, was not relative to the means by which others brought it about, but to the persons who married infants; and if the subtilty was requisite to constitute the offence in them, it would not have run *every person contracting matrimony*, but *so* contracting, or contracting *in manner aforesaid*.

To this it was shortly answered, that the verdict had expressly found, that the defendant *Katherine* did not persuade or procure the said *John Kent*, the younger, to contract matrimony with

N. Fazakerly.

W. Murray.



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with her by subtil means or secret insinuations, delusions, threats, or menaces; and therefore it must be taken, that he married her voluntarily and freely, in which case she could not be said to have been guilty of any offence; and consequently, there was no foundation to deprive her of the provision which the law has made for her. And this act being in the nature of a penal statute, ought to be construed strictly; especially in the case of dower, which the law has always very much favoured.

JUDGMENT  
affirmed.  
Jour. vol. 25.  
p. 316.

AFTER hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench in *England*, affirming the several proceedings in the Courts of King's Bench and Common Pleas in *Ireland*, should be affirmed; and that the transcript of the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House: And it was further ORDERED, that the plaintiffs in error should pay to the defendants in error, 100*l.* for their costs, sustained by reason of the bringing of the said writ of error.

|          |                                  |   |   |              |
|----------|----------------------------------|---|---|--------------|
| Case 46. | <i>Joseph Nagle</i> , Esq;       | - | - | Appellant.   |
|          | <i>George Foot</i> , and Others, | - | - | Respondents. |

12th March, 1739.

THIS was an appeal brought from several orders made by the Court of Exchequer in *Ireland*; by the first of which, the respondents were at liberty to shew cause, why a bill brought by them against the appellant should not be dismissed with costs; and by the others, the time limited for that purpose was several times enlarged. And as the question turned wholly upon the regularity of bringing such an appeal, and not upon the merits of the dispute; it is thought unnecessary to state any more of the facts or circumstances of the case.

W. Hamilton.

W. Murr y.

In support of the appeal it was said, that the application to dismiss was a motion of course, and therefore none of the parties ought



ought to be heard in opposition to it; and much less should any time be given or enlarged to shew cause against such a motion.

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On the other side it was said, that the Court of Exchequer had given no judgment as to the motion made by the appellant, but only given time to the party to shew cause against it; and it was apprehended to be unprecedented to appeal from an order only granting time to shew cause. For if this should be permitted, it must tend to great vexation and infinite delay; and nothing can be more reasonable, than to allow every Court of justice to be the proper judges of the time and manner of giving their judgment.

D. Ryder.  
W. Noel.

On the hearing of this appeal, the Counsel were directed by the House to speak to this point only; "Whether an appeal will lie from an order of a Court of Equity to shew cause, before the same be made absolute?" And having been heard accordingly, it was DECLARED, that this appeal being brought against an order to shew cause only, and no unreasonable delay having been occasioned to the parties by the time given for shewing cause, was improperly brought: And therefore it was ORDERED, that the same should be dismissed; and that the appellant should pay to the respondents 50*l.* for their costs in respect of the said appeal.

APPEAL  
dismissed,  
Jour. vol. 25,  
p. 480.

George Hartpole, Esq; - - Appellant. Case 47.

Hunt Walsh and Philip Tench, Esqs; Respondents.

17th April, 1740.

ROBERT Hartpole, Esq; the appellant's great great grandfather being seised in fee of the castles, towns and lands of Blackford, and the hamlets thereof, viz. Bawn Ballyna, alias Oulertleagh, Cloukerim and Monneferick, in the Queen's county; did, by indenture of feoffment, dated the 30th of July, 1639, in consideration of 600*l.* then lent him by Oliver Walsh, Gent. the respondent's grandfather, convey the same to the said Oliver Walsh, in fee; subject to the following

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ing proviso: "That the indenture of feoffment should be void whenever *Robert Hartpole*, his heirs, executors, administrators, or assigns, should on any last day of *June* or *December*, pay unto the said *Oliver*, or his heirs, the sum of "600*l.*" — And the premises being then in lease for a term of 41 years, at a rent of 60*l.* a year, and 10*l.* *per cent.* being the then legal interest of money in *Ireland*; it was agreed by the said indenture, that *Oliver Walsh* and his heirs, should receive that yearly rent in lieu of his interest money. And in pursuance of this agreement, he was soon afterwards put into possession of the premises, and the tenants duly attorned.

By indentures, dated the 10th and 12th of *March*, 1640, *Robert Hartpole* and *Katherine* his wife, in consideration of a further sum of 2300*l.* paid to them by the said *Oliver Walsh*, granted and conveyed not only the premises comprised in the former mortgage, but the castle, town and lands of *Ballykillcaven*, and other towns and lands in the *Queen's* county, to the said *Oliver*, his heirs and assigns: And the said *Robert* thereby covenanted, for himself and his heirs, that whenever *Oliver Walsh*, his heirs or assigns, should give to him, his heirs or assigns, eighteen months notice, by letter in writing, requiring payment of the said 2300*l.*; that then the said *Robert*, his heirs or assigns, should pay the said 2300*l.* within eighteen months next after such request; and that whensoever he the said *Robert Hartpole*, his heirs or assigns, should pay the said 2300*l.* that he or they would also satisfy and pay to the said *Oliver Walsh*, his heirs or assigns, after the rate of 10*l.* *per cent.* for the said money, from and after the last *gale* before any such payment made: And in this indenture, there was also a covenant that the said *Robert* and *Katherine* should levy a fine, and suffer a recovery of all the lands and premises therein comprised, to the uses following; *viz.* as to the premises in the first mortgage, to the same uses, intents and purposes, as were expressed therein; and as to the premises in the last mortgage, to the use and behoof of *Oliver Walsh*, during his natural life; and after his decease, to such uses, intents and purposes, as the said *Oliver Walsh*, by any instrument in writing under his hand and seal, testified and subscribed by three or more credible witnesses, or by his last will and testament in writing under his hand and seal, testified and subscribed as aforesaid, should appoint; and, for want of such appoint-



appointment, to the use of the said *Oliver Walsh*, his heirs and assigns, for and until such time as the said *Robert Hartpole*, his heirs, executors, administrators, or assigns, should, at one entire payment, pay to *Oliver Walsh*, his heirs or assigns, the sum of 2300*l.*; and after such payment, to the use and behoof of the said *Robert Hartpole*, his heirs and assigns for ever. And the said *Robert* thereby also covenanted, that *Oliver* and his heirs should peaceably hold and enjoy the premises, free from all incumbrances; and that he and his heirs would, at any time upon request, make further assurances.

In pursuance of this conveyance, *Oliver Walsh* was, in *March*, 1640, put into possession of all the last mentioned premises, and a fine and recovery were accordingly levied and suffered by *Robert* and *Katherine Hartpole*. But *Robert* being a papist, and a person of great note and estate in those times, engaged very early in the rebellion in *Ireland*, (which began in 1641, about seven months after the last mentioned conveyance) and seems to have borrowed this sum of 2300*l.* for the promotion of that rebellion; for which he was afterwards in 1643 attainted: And *Oliver Walsh*, being a protestant, was in the beginning of the rebellion, turned out of possession of all the premises by *Robert Hartpole*, and was kept out of possession till the year 1654, by him and *William Hartpole*, his eldest son (who was likewise a nocent papist and concerned in the said rebellion, and attainted of high treason for the same); during which time, *Walsh* neither did, or could receive any of the rents or profits of the said mortgaged premises, or any interest for the mortgage money.

In 1654, *Oliver Walsh* was restored to the possession of the premises by a decree of the then Court of Claims; and in 1657 died in possession, leaving *Oliver Walsh*, his only son and heir; who thereupon entered into possession of the premises.

Sir *Robert Hartpole*, the only son of *William*, and grandson of *Robert*, on the 17th of *August*, 1663, obtained a decree before the Commissioners of Claims in *Ireland*, which related to many other manors, towns, lands, tenements and hereditaments, in *Ireland*, besides the mortgaged premises; grounded on a voluntary settlement, alledged to have been made by Sir *Robert's* grandfather in the year 1639. And this decree stated, that

*Robert*



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*Robert*, the mortgagor, was and continued seised by perception of the rents, issues and profits of the mortgaged premises, until the time of his death, in *August*, 1649; that *William* his son, immediately after his death, became seised of an estate for life, therein, with remainder to his first and every other son in tail male; and continued so seised by perception of the rents, issues and profits thereof, until his death in 1654; that immediately after the death of *William*, the estate and interest in the premises came to Sir *Robert* the claimant, as only son and heir of *William*, which Sir *Robert* was then an infant; that he, by his mother and guardian, entered into the premises, and was seised in fee tail thereof by virtue of the limitations in the said settlement, and continued so seised until some time in the same year 1654, when he was dispossessed thereof by the then usurped powers; and that he had from that time been kept out of possession: Wherefore, it was by the said decree declared, that the said *Robert* the mortgagor, and *William* his son, were both nocent papists, guilty of the then late rebellion in *Ireland*; but that the claimant was an infant of tender years, and an innocent person; and that a settlement had been made of all the lands mentioned in the said decree in 1639, except the said mortgaged premises, which were by the said deeds of mortgage, for the considerations of the several sums therein expressed (which are in the decree mentioned, and by mistake computed to amount in the whole only to 2300*l.* instead of 2900*l.*) legally conveyed by *Robert* the mortgagor, subject to such conditions of redemption as aforesaid, unto the said *Oliver Walsh* in fee; and that the said mortgaged premises were then held and enjoyed by the said *Oliver Walsh*, son and heir of *Oliver* the mortgagee; and that the said *Robert* the mortgagor, had only a power of redemption thereof; and therefore, although it was decreed that Sir *Robert* the claimant should be restored to the possession of the rest of the premises, and that the heirs male of his body should have and enjoy such estate and interest therein, as the said *Robert Hartpole* the mortgagor was seised of on the 22d of *October*, 1641; yet it was directed, that all the said mortgaged premises should be excepted out of the said decree, and that Sir *Robert* the claimant, should be left to take such course, either in law or equity, concerning the same, as he should think fit; and that *Oliver Walsh*, and the other defendants



defendants in the said decree, should likewise be left to take such course in law or equity as they should think fit, to try the title to the premises, or any part thereof; and that the claimant, and the heirs male of his body, should have and enjoy the premises, subject to such incumbrances as the same were liable to.

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In *Hilary* term, 1670, Sir *Robert Hartpole* filed a bill in the Court of Exchequer in *Ireland*, against the said *Oliver* the son; whereby he set up a title to all the mortgaged premises, under colour of the aforesaid voluntary settlement, and thereby endeavoured to avoid the mortgages; and altho' it appeared by the aforesaid decree, that *William*, the father of Sir *Robert*, was in possession till 1654; yet he charged by his said bill, that *Oliver*, the mortgagee, entered into possession of the premises in 1650, and received the rents and profits thereof, and committed great waste in the woods; and that after his death, in 1657, *Oliver*, the son, entered into possession, and received the rents and profits, under pretence that the premises had been mortgaged by *Robert*, the grandfather of Sir *Robert*; who by his bill denied that there had ever been any such mortgage, and therefore Sir *Robert* prayed an account and relief.

This bill the defendant *Oliver* answered, and set forth both the mortgages, and that due notice had been given to *Robert Hartpole*, the mortgagor, requiring the payment of the mortgage money; and insisted, that the settlement under which the plaintiff claimed, was voluntary, and made since the beginning of the rebellion; and therefore that the mortgage money ought to be paid, before the plaintiff should be restored to the possession.

Issue having been joined in the cause, witnesses were examined on both sides; and it was proved by several of Sir *Robert Hartpole's* witnesses, that *Robert* the mortgagor was in possession and receipt of the rents of the premises, till the *May* before his death; and that *Oliver* the mortgagee did not enter into possession till 1651, which was two years after the death of *Robert* the mortgagor.

In *November*, 1671, *Oliver Walsh*, the son, filed a bill in the Court of Chancery in *Ireland*, against Sir *Robert Hartpole* and others; setting forth the said mortgages, fine and recovery,



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and that the mortgagor covenanted, that the premises were free from all prior incumbrances; and that *Oliver* the mortgagee entered and was possessed by virtue of such mortgages, and built and made improvements on the premises to the value of 200*l.* and upwards; that *Oliver* the son, entered after his father's death, and built and improved the estate to the value of 200*l.* more; that his father and he had been disturbed in the possession and enjoyment of the said lands by one *Lawrence Allen*, who had a statute-staple affecting the mortgaged premises, and by others, who had other incumbrances affecting the same, prior to the said mortgages, whereby the said *Oliver* and his father were damaged above 600*l.* That Sir *Robert Hartpole*, under pretence of a settlement made by *Robert* his grandfather, had entered upon several parts of the mortgaged premises of the value of 20*l.* a year, pretending the same to be parcel of other lands claimed by him under the said settlement; and had filed such bill in the Court of Exchequer to avoid the said mortgages, as before stated; and therefore the said *Oliver* the son, prayed to be relieved in the premises, and particularly to be paid the mortgage money, and the value of the improvements, and what the profits of the lands had fallen short of the interest money.

To this bill Sir *Robert* put in his answer; whereby he denied any knowledge of the mortgages, and admitted, that by virtue of the settlement he entered on the lands; but insisted that the mortgagee had no title to the same.

Issue being joined in this cause, several witnesses were examined on both sides: And it appeared by the proofs on the part of *Oliver Walsh*, that he or his father never made or received 150*l.* a year, out of all the mortgaged premises during the time they were in possession, and for several years not above 130*l.* a year, on account of the then low value of the same, and of the disturbances given them by means of the aforesaid prior incumbrancers; and by Sir *Robert Hartpole's* endeavouring to lay the quit-rent of his whole estate on the mortgaged premises, which were not liable to the payment of it, and for that purpose, procuring the cattle of the said *Walsh's* tenants to be distrained for the arrears of the said quit-rent; on which account the tenants left the lands, which therefore lay waste. Sir *Robert Hartpole's* proofs



proofs went only to a general imaginary value of the mortgaged premises, as amounting to 300*l.* a year; and an attempt to prove that waste had been committed in the woods by *Oliver* the mortgagee, to about 1000*l.* value.

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In 1682, Sir *Robert Hartpole* died, and *William*, his son and heir, by his mother and guardian Dame *Bridget Hartpole*, in June, 1683, filed a bill of revivor of the said cause in the Exchequer, against the said *Oliver* the son; and thereupon *Oliver* revived the cause in Chancery, against the said *William Hartpole*, the son of Sir *Robert*.

In December, 1683, *Oliver* the son filed another bill in Chancery against the said *William Hartpole*, the son of Sir *Robert*, setting forth both the mortgages and the several uses of the lands thereby granted; and that *Robert* the mortgagor, borrowed the farther sum of 100*l.* from *Oliver* the mortgagee, on a bond; and therefore praying, that if he was to account with the said *William Hartpole*, he might be allowed for all his improvements, and be paid the 600*l.* and 2300*l.* together with the said 100*l.* and all the interest thereof.

To this last bill, the said *William Hartpole*, by his guardian, pleaded and demurred, for that the bill was to the same purpose as the said *Oliver Walsh's* former bill: And in February, 1683, the plea and demurrer were over-ruled, and the defendant was ordered to answer. Whereupon his Counsel and Clerk in Court, agreed to allow the eighteen months notice to have been given, pursuant to the covenant in the second deed of mortgage as proved, and also liberty to prove the before mentioned bond on taking the account.

On the 5th of February, 1683, a decretal order was made as well on the bill of revivor, as on the original bill of *Oliver Walsh*; in which decree, both the mortgages were recited, and a fine and recovery were mentioned to have been had to the uses, and in pursuance of the covenant contained in the second mortgage; and the decree likewise recited, that it was admitted by the defendant's counsel, that notice had been given by the plaintiff *Walsh*, for calling in the mortgage money in such manner as was expressed in the plaintiff's bill of revivor; and that both parties



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parties had submitted both causes, as well in the Exchequer as in the Court of Chancery, to the determination of the Court of Chancery; and the plaintiff *Walsh* consented, that the defendant *Hartpole* should be qualified to have a decree in the Court of Chancery, in the same manner as if he had been plaintiff in the cause there depending: And a question arising, Whether the 600*l.* mentioned in the first deed was included in the 2300*l.* secured by the second mortgage, or, whether they were distinct sums; and the defendant's counsel having offered several reasons mentioned in the said decretal order, why the said 600*l.* should be supposed to be included in the 2300*l.*; but it seeming very clear by the second deed of mortgage, that the 600*l.* was not included in the 2300*l.* the then Lord Chancellor declared his opinion accordingly; but added, that since the defendant's counsel made a matter of it, he would have some of the Judges opinions on that point: And in the mean time decreed, that the parties should go to an account before two of the Masters, in relation to what rents or profits had, or might have been received out of the premisses by the plaintiff or his father, and in relation to the interest due for the several sums of 600*l.* and 2300*l.* and to such improvements as had made the land the better, and to the charges occasioned by the defendant *Hartpole* and his father, and to the interest of the money during the time that Sir *Robert Hartpole's* father enjoyed the lands in the then late rebellion; and the Masters were to allow the defendant such consideration as they should think fit, for what waste of woods had been committed by the plaintiff, or his father, or their orders: And as to the bond of 100*l.* the plaintiff was to be allowed the same with interest, in case he could prove the perfection thereof before the Masters; and they were thereby armed with a commission to examine witnesses as to the proof of the bond, and also to any other matters of account or waste, not before examined to; and they were to settle the whole account as far as they could, and to report the particulars in which they were not able to settle it.

The Masters accordingly entered into the examination of the matters referred to them by this decree, and on perusal of the depositions and other proofs taken in the cause, they found them so various, uncertain and disagreeing with each other, that on the 20th of *June*, 1684, they reported that they could not



not proceed to the true stating the account, and settling the other matters directed by the decree, until the following issues, which had been agreed and consented to by all parties, should be tried in such manner as the Lord Chancellor should direct; viz. I. What rents and profits had, or might have been yearly made or received out of the lands in the said order mentioned, by the plaintiff or his father, without wilful default, from the 1st of *May*, 1653, to the 1st of *May*, 1660; and from the 1st of *May*, 1660, to the 1st of *May*, 1670; and from the 1st of *May*, 1670, to the 1st of *May*, 1684; over and above all the necessary charges. — II. Who did possess and enjoy the said lands, or any and what part thereof, from the 23d of *October*, 1641, to the 1st of *May*, 1653. — III. What waste or destruction of woods, had been made or committed by the plaintiff or his father, or either of their orders, on the said lands, or any and which of them, since the 1st of *May*, 1653, and of what nature were such woods so wasted or destroyed. — IV. What improvements the plaintiff or his father, or their tenants had made on the premises, since the 1st of *May*, 1653, and when the same were made, and by whom, and of what value, and how much the said lands were, or had been bettered thereby, and from what time. — V. What charges the plaintiff's father, or the plaintiff had been at, in defending the said lands against the said *Allen's* statute, or any other and what account, till the 1st of *May*, 1684.

This report was filed, and notice given of the filing thereof by the plaintiff's Clerk in Court, on the 25th of *June*, 1684; and tho' *William Hartpole* attained his full age of 21 in the year 1692, yet no step was taken in either of the said causes, from the 25th of *June*, 1684, until the 4th of *April*, 1709; which was several years after the death of the said *Oliver Walsh*, the son, which happened in 1697; and then and not before, *William Hartpole* filed an original bill, in the nature of a bill of revivor against the respondent *Hunt Walsh*, eldest son and heir of the said *Oliver* the son, who, on his father's death, entered into possession of the mortgaged premises; setting forth the several matters aforesaid, and particularly the decretal order and report, and that no further proceedings were had in the said cause; and complaining, that the cause being abated by



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the death of *Oliver* the son, the respondent refused to revive the same, and try the said issues; but had entered into the premises, and from thenceforth received the rents and profits thereof, and pretended a right to the 600*l.* and 2300*l.* as due on the said mortgages, tho' the plaintiff was advised, that it appeared by the said deeds of mortgage, that the 600*l.* secured by the first deed, was included in the 2300*l.* secured by the last deed; and therefore the plaintiff prayed an account, and to have the benefit of the former proceedings, proofs and decree in the said cause in Chancery, and to revive the same, and offered to pay what should finally appear to be due: But the plaintiff, in this his bill, did not object to the issues which had been reported by the Masters, either as improper or unnecessary.

The respondent *Walsh* put in his answer to this bill; and thereby insisted, that the two sums of 600*l.* and 2300*l.* were distinct sums; and that the said *Robert* and *William*, the plaintiff's ancestors, were attainted for the rebellion in 1641; and that after so great a length of time, the plaintiff ought not to be admitted to a redemption, or the defendant obliged to account for the rents and profits, which had amounted to no more than 272*l.* 10*s.* *per ann.* The respondent likewise added, that he had not only made several improvements on the premises, but that he had, on his marriage, settled the same on his wife *Eleanor Tench* and her issue.

In *July*, 1710, *William Hartpole* filed a supplemental bill in Chancery, against the respondent and the trustees in his marriage settlement; setting forth, that he knew nothing of the respondent's marriage settlement, till it was disclosed by his answer; and therefore, as he could not seek relief against the same by his first bill, he prayed relief against it by this.

The respondent *Walsh* answered the supplemental bill, and set forth his marriage articles, and that he made the same; apprehending, that the plaintiff having so long surceased any proceedings in the suit, had no right to redeem.

In *January*, 1713, *William Hartpole* died, leaving issue two sons, *Robert*, the elder, who died soon after, an infant, without issue, and the appellant.



The appellant, in *February*, 1715, and during his minority, filed a bill of revivor of his father's suit, and the proceedings therein, and also in the former causes, and of the said decretal order in 1683, against the respondent *Walsh* and the trustees in the said settlement; and prayed he might stand in the same plight and condition, with respect to the said proceedings, as his father was in at his death; and thereby set forth, that several of the leases made by *Oliver*, the father and son, were expired, and new leases made at an improved rent, but that the same were under-set; and that the respondent, by cutting woods on the premises, and by perception of the rents and profits, had been satisfied what was due for the principal and interest on the said mortgages.

The respondent *Walsh* put in his answer to this bill; and insisted, that the mortgages were not redeemable on account of the length of time and the difficulty of accounting, and denied that any of the mortgaged premises were under-set; but averred, that the whole rents and the yearly value thereof amounted, in 1716, to about 438*l.* a year; and that he had made considerable improvements on the lands of *Ballykillcaven*, and had never cut down any woods.

Tho' issue was joined in this cause in 1720, yet no further proceedings were had therein, as against the respondent *Walsh*, till 1730, when the appellant attained his full age, and obtained an order for liberty to proceed in his own name. And one of the said trustees in the respondent's marriage articles being dead, the appellant, in 1733, and not sooner, applied to the respondent *Walsh*'s agent, and desired there might be an answer filed in the name of the other respondent *Philip Tench*, to the appellant's said bill, which was filed within less than a month after the same was desired; to which the appellant having replied, and issue being joined, the appellant examined two witnesses only, one to the yearly value of the mortgaged premises, and the other to the proof of some woods cut down by *Oliver Walsh*, the son, before the decree in 1683; whose deposition, relating to facts which were in issue in the cause wherein the decree was made, was therefore, not permitted by the Court, to be read on the hearing.

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The respondent *Walsh* examined many witnesses to the value of the mortgaged premises, from 1692 to 1735; and it was proved in the causes, that several sums, amounting to about 2000*l.* sterling, were expended by the respondent *Walsh*, his ancestors and their tenants, in valuable and lasting improvements, whereby the yearly value of the mortgaged premises had been much raised, and that the rents thereof never amounted to more than 272*l.* 10*s.* from 1692 till the year 1713; and, notwithstanding the several improvements which had been made, never exceeded 450*l.* a year, till the year 1734; and that at that time, the rents, making due allowances for the improvements, did not amount to above 500*l.* a year.

Publication having passed in the cause, the same came on to be heard before the Lord Chancellor of *Ireland*, on the 5th and 9th of *February*, 1736, the 13th and 14th of *July*, the 18th, 19th, 21st, 22d, 25th, 29th and 30th of *November*, and 1st of *December*, 1737; and on hearing the proofs read, and on debate of the matter, the Court was pleased to take time to consider of the same; and on the 27th of *July*, 1738, his Lordship was pleased to decree, that the appellant's bill should be dismissed with costs.

D. Ryder.

W. Murray.

From this decree, the appellant thought proper to appeal; contending, that this mortgage appeared to have been an indefinite mortgage in its first creation, and expressly made redeemable, whensoever the principal sum of 2300*l.* should happen to be paid in one entire payment to the mortgagee, his heirs or assigns, according to the then known and received usage and method in *Ireland* of conveying lands in mortgage; and therefore it was apprehended, that no length of time ought to be insisted upon, in bar to a redemption in the present case, contrary to the plain intent of the parties, and the positive terms of their agreement; at least not by the respondent, who claimed only as heir at law to the mortgagee, and had not been able to shew any sale, settlement, or other disposition, whereby to entitle himself, as a purchaser for a valuable consideration, to any part of the premises. That the repeated submissions of *Oliver Walsh* to a redemption, not only in his answer to the bill filed against him in 1670, but in all his own bills for a foreclosure; the exceptions inserted afterwards of that right,



in the leases made by him of the premises; together with the like saving, which would have appeared in the respondent's own marriage-articles, if he had thought proper to produce them; amounted to the clearest and most explicit acknowledgment of the appellant's undoubted right to redeem the premises, notwithstanding the pretences now set up to preclude him. And that any objection which might arise in this case, from the difficulty of accounting, was fully answered by the appellant's submitting to pay the principal in one entire payment, and to let the profits be set against the interest, according to the plain express provision of the mortgage deed; by which the mortgagee was let immediately into the receipt of those rents, but to receive no interest, except the mortgagor should pay back the entire principal, without such convenient notice, as might enable him to look out for another security, and then only for six months; which was a case that never happened. It was therefore, hoped, that the decree of dismissal would be reversed, and that the appellant would be let into a redemption.

On the other side it was argued, that the mortgage deed of the 12th of *March*, 1640, comprising all the mortgaged premises, put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption, by demanding the mortgage money; and such demand was admitted to have been made by *Oliver Walsh*, the son, as appeared by the decree of 1683. But if there had been no such admission, it was conceived, that the filing of the bill by *Oliver*, the heir of the mortgagee, in 1671, was equivalent to an actual demand of the mortgage money; and therefore from that time, the mortgage, whatever it was originally, became of such a nature, as made the equity of redemption liable to a foreclosure, either by a decree, or great length of time. That no step was taken towards a redemption of the premises, till 1670, which was thirty years after the mortgages were made; and even then, the bill exhibited by Sir *Robert Hartpole*, the appellant's grandfather, was principally founded, not upon an equity of redemption, but upon a legal title under a settlement set up by him, in opposition to the title of the mortgagee; and when afterwards, in the progress of that cause, it was thought necessary by the Masters to whom the account was referred, and by all

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the parties concerned in the cause, to try five issues, in order to settle the account; the appellant's father, who, tho' nominally a defendant, was, nevertheless, in the nature of a plaintiff, deserted that cause; and during the seventeen years after he came of age, proceeded no further in it, as he might and ought to have done: And therefore, after so much delay and negligence in the appellant's ancestors, as well as in the appellant himself, and at so great a distance of time as very near 100 years; it was conceived, that no redemption of the premises ought now to be decreed, but that the appellant ought to be left to his remedy at law, if he had any. For it would be very unequal, that the mortgaged premises, happening by the accidental rise in the value of lands, to be now worth more than 2900*l.* the appellant should therefore, at this distance of time, be at liberty to redeem; when none of his ancestors ever tendered, or even offered to pay the 2900*l.* when the lands were not worth so much, and when the mortgagee, or any deriving under him, could not, on account of the mortgagor's attainder, ever compel either him, or any of his descendants, to pay even the principal money due on the mortgages, though the lands were fallen, as they actually were, from 1641 to 1704, ever so much below the value of such principal money. But if a redemption was to be decreed, yet, as it appears by the mortgage deeds, that the respondent's grandfather advanced 2900*l.* on the security of lands, out of which he received no rents or profits for the first twelve years, from the beginning of the rebellion in 1641, and which afterwards, till about 1709, (on account of the badness of the times, occasioned by that rebellion and other subsequent accidents, as well as by means of the prior incumbrances laid on the premises by *Robert*, the mortgagor) never yielded half the yearly interest of the principal mortgage money; it would be highly unreasonable to decree a redemption of the premises without an account, by setting the supposed imaginary profits, great part of which were, in fact, received by the mortgagor and his son, against the interest; and decreeing the respondent only the 2900*l.* originally advanced, the value of which, at this distance of time, is not above one third of what it was at the time of advancing it: And if an account was to be directed, it would be absolutely impossible to settle that account, which comprehends a period of 100 years, and a proportionable variety of transactions; for even 50 years ago, it was thought impossible



impossible to settle the account, which was then requisite to be taken, without a trial of five issues; none of which had been, or could now be tried, or the matters to which they related cleared up, by any living witnesses. That it appeared by the multiplicity of bills, answers and proceedings in the causes, that the respondent and his ancestors had been put to very great expences in recovering and keeping possession of the mortgaged premisses, after having been forcibly turned out by the original mortgagor himself, during the rebellion in 1641, and in defending their title, first in the two Courts of Claims, and afterwards in the Exchequer and Chancery in *Ireland*; but which expences it was now impossible to ascertain: And therefore it was hoped, that the appeal would be dismissed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.  
Jour. vol. 25.  
p. 516.

*Jane Vernon*, Widow, and Executrix of }  
*Thomas Vernon*, Esq; } Petitioner.

Case 48.

Captain *John Vernon*, - - Respondent.

25th April, 1740.

IN 1676, *John Vernon*, son of General *John Vernon*, brought his bill in the Court of Chancery in *Ireland*, against Colonel *Edward Vernon*, *John Carter*, *Thomas Ferris*, *Anthony Knightsbridge* and *Giles Martin*; setting forth, (amongst other things) that in 1653, *John Blackwell*, Esq; upon the propositions and acts of Parliament for advancing money on the rebels lands in *Ireland*, had for his money, *bona fide* paid, the town and lands of *Clontarff*, with the island adjoining, and the *Upper* and *Lower Hollybrooks*, in the county of *Dublin*, being in all 609 acres, 3 roods and 24 perches of profitable land, plantation measure, set out and assigned to him and his heirs, towards satisfaction of 2700*l.* by him advanced by way of adventure; to be held



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held by him and his heirs for ever. — That *Blackwell*, being thus possessed of the said premises, sold the same for a valuable consideration to General *Vernon* and his heirs; who became possessed thereof, and laid out in buildings and other improvements thereon, 1500*l.* and continued in possession thereof till after the restoration. — That soon after that event, General *Vernon* applied to Colonel *Vernon*, (who had an interest with King *Charles II.*) to get the said estates secured to him by the King, which the Colonel agreed to undertake; and being desirous to buy the lands of *Clontarff* and the island, proposed to give 1600*l.* for the same, which the General agreeing to, a writing was, on the 22d of *September*, 1660, drawn and signed, whereby the General promised, on the Colonel's paying 1600*l.* down to him in fourteen days, to convey the said lands of *Clontarff*, (the house and lands of *Hollybrooks*, being 80 acres, excepted) to the Colonel and his heirs; otherwise the said agreement, and all treaties about it, were to be void: And the Colonel was, by such means as he thought proper, to secure the said premises; but the grant was to be taken in the Colonel's name, in trust for the General, unless only as to the said lands of *Clontarff* which were so purchased by the Colonel, as aforesaid, if he paid the said 1600*l.* — That on the 26th of *November*, 1660, Colonel *Vernon*, in pursuance of the said agreement and trust, procured a grant, by letters patent, of all the said premises from his then Majesty, to him and his heirs; and by the acts of settlement, those letters patent were confirmed; and amongst the saving of rights it was expressed, that the right of *Blackwell*, his heirs and assigns, and all claiming under him and them should be particularly excepted, and not be saved: But this was so done, purely that the success of the adjudication of setting out *Blackwell's* adventure or incumbrance, might not prejudice the said letters patent; and not out of any intention to destroy or avoid the said trust, but to confirm and secure the same. — That the Colonel having obtained the said letters patent, and the same being confirmed by the act of settlement, during the sitting of his Majesty's Commissioners, he put off reconveying the said premises to the General and his heirs, or going on with the purchase; pretending, that till it was ascertained, whether the old proprietor, or his issue, would be restored, it was best to leave the interest thereof in the



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the Colonel, according to the letters patent, which the General agreed to. — That the General, residing in *England*, and the Colonel going over to *Ireland*, he promised the General to collect the rents and profits of the premises, and thereout to satisfy himself what he had expended in procuring the grant and securing the premises, as aforesaid, and to pay the overplus to the General; And accordingly, the Colonel continued to receive the rents and profits, and paid the General and his wife several sums of money on account thereof. — That the Colonel, on the 1st of *March*, 1666, obtained the adjudication and certificate of the Commissioners of the Court of Claims, for the said lands and premises, and in the act of explanation, obtained a confirmation of the said letters patent. But, intending to defraud the General of the premises, he did, from time to time, during the General's life, keep off the execution of the said trust, and a reconveyance of the said premises, and perfecting the said agreement for the purchase thereof; pretending, that the premises were not fully settled. — That before the trust was executed, or any reconveyance or purchase made, the General, in *May*, 1667, died intestate, leaving *John Vernon*, his son and heir at law, then an infant. — That on the 29th of *August*, 1671, the Colonel procured further letters patent of the said premises to him and his heirs. — That the said *John Vernon* coming of age, and having obtained administration to the General, his father, applied to the Colonel, requiring him to execute the said trust, and to account with and pay him all the arrears of rent of the said premises, ever since he received the same, deducting what he had paid to the said *John Vernon's* father and mother, and the charges of securing the premises, as aforesaid; who refused so to do, and had made a lease of the premises to the defendant *Martin*, and divers secret estates to the other defendants: The bill therefore prayed, that the Colonel might set forth an account of, and account with him for the rents and profits of the premises; and set forth what right the Colonel, or any persons claiming under him, had to the said premises; and that the Colonel might reconvey the premises to the said *John Vernon* and his heirs: But if it should appear, by any agreement in force between the Colonel and General *Vernon*, and for any consideration to be paid the General, that the Colonel was to have any



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part of the premises, and the Colonel to assign the remainder to the General; that the said agreement might be pursued, and the money, with interest since *May*, 1660, be paid to the said *John Vernon*, together with the rents and profits of the said premises.

To this bill, the Colonel put in a plea and answer; and by his answer, admitted the several letters patent, acts of settlement and explanation, adjudication and certificate of the Court of Claims; by which title, he claimed to hold the premises against the said *John Vernon*, absolutely to him and his heirs.

He denied, that he agreed to take any grant of the premises from his Majesty, on any trust for the General; but alledged, that the same was granted for his own use and benefit solely, and was in consideration of his great sufferings and services; and that all clauses put into any act for establishing the same to him, and particularly for barring *Blackwell's* right, and those claiming under him, were really intended for his own benefit, without any trust for the General. He also denied having agreed with the General, that when the premises were secured, the same should be in trust for him; or having ever promised, that if he got a grant thereof in his own name, the same should be for the use of the General and his heirs. He then alledged, that the plaintiff's father, having served the Usurpers, and opposed the King's restoration, was obnoxious to the Government, and in 1660 was imprisoned, as a dangerous man; where the Colonel, as being his cousin german, went to visit him, and was assisting to him for his enlargement, and helped him and his wife to sums of money, some whereof were the arrears of rent before the Colonel's possession, which he promised to get in for the plaintiff's father as his steward; and the rest were monies which the defendant paid them, but not on account of the rents of the premises, after his being in possession. And confessed, that he had mortgaged the premises to *Carter, Ferris* and *Knightbridge*, and their heirs, for securing the repayment of 2000*l.* and interest.

And as to so much of the bill, as sought an account of the rents and profits of the premises, or a conveyance from the Colonel to the plaintiff; the defendant pleaded the said letters patent



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patent of the 26th of November, 1660, his entry and possession under the same, the confirmation thereof by the act of settlement, by a particular clause against *Blackwell's* title and all claiming under him, and the further confirmation thereof in the act of explanation, and his claim, and the allowance thereof, and certificate had thereon, and the subsequent letters patent.

On arguing this plea upon the 28th of May, 1677, the benefit thereof was saved to the hearing; and as to the account of profits, the plaintiff's counsel waived the same.

The defendants *Carter, Ferris* and *Knightbridge*, by their answer, denied the knowledge of any trust in the Colonel for General *Vernon*, and insisted upon the said mortgage for 2000*l.* and interest; and averred, that the whole money then remained really due.

The cause being at issue, divers witnesses were examined on both sides, and several letters of Colonel *Vernon* and other persons, were exhibited and proved by the plaintiff. And on the 14th of May, 1686, the cause came on to be heard; when the Court declared they saw no cause to give the plaintiff any relief, and therefore dismissed his bill.

This decree of dismissal the Colonel got inrolled, and in January following he died; having made his will, and thereby devised his real estates to trustees and their heirs, for payment of his debts and legacies; and after payment thereof, in trust to settle the same, or what should remain unfold, upon his daughters *Elizabeth* and *Mary*, and their issue, in such manner as they might not have power to sell or alien the same in case they died without issue; with remainder to his brother *John Vernon*, and his first and other sons in tail male, with divers remainders over; and therein directed, that his said daughters should be allowed 60*l.* a year a-piece for their maintenance, till his debts and legacies were all paid.

*Elizabeth* died soon after her father, without issue and unmarried, and *Mary* survived her; whereby she became entitled to all her father's estate.

In



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In 1705, *John Vernon* brought his appeal in the House of Lords in *Ireland*, against the said *Mary*, as surviving daughter and heir of Colonel *Vernon*, complaining of the said decree of dismissal of the 14th of *May*, 1686; and praying, that the same might be reversed, and that he might have an account of the rents and profits of the premises, and a reconveyance thereof to him and his heirs, and the possession delivered up to him.

*Mary Vernon*, by her answer to the said appeal, set forth her father Colonel *Edward Vernon's* will; and contended, that the estate in law in the lands was in trustees, and that she had but an estate for life therein, which was not to take place till after payment of her father's debts and legacies; and that the next in remainder upon her death, was *Edward Vernon*, only son and heir of *John*, the testator's brother (which *John* died soon after the testator) who resided in *England*, and none of whom were made parties to the said appeal.

On the 14th of *July*, 1705, the cause on the appeal was heard; when the said decree of dismissal of the 14th of *May*, 1686, was reversed. And on the 26th of *July*, 1707, the cause was further heard; when the former decree of reversal of the said decree of dismissal was confirmed; and two thirds of the *Upper* and *Lower Hollybrooks*, with the appurtenances, were decreed to the said *John Vernon* and his heirs, discharged from all incumbrances made by Colonel *Edward Vernon*, or any persons claiming under him. And the said *Mary Vernon* was decreed to pay to the said *John Vernon*, his executors and assigns, 1000*l.* within twelve months, with interest; and in case the same was not then paid, the said *John Vernon* was to be put into possession of *Clontarff*, with the appurtenances, and the remaining third of the *Hollybrooks*, and to continue in possession thereof till the said 1000*l.* and interest, should be fully paid, which was to be a charge on *Clontarff*, and the said remaining one third part of the *Hollybrooks*, in the said *Mary's* possession, as a security for the repayment thereof, at one entire payment, with lawful interest, till the same was fully paid, from the date of the said decree; but the person of the said *Mary*, was not to be in any wise subject to the payment of the said 1000*l.* and interest. And, she was also decreed to pay the said *John Vernon* 100*l.*



100*l.* for the costs in the said suit: And it was farther ordered, that the said *Mary*, who had the estate in law, should convey to the said *John Vernon* and his heirs, the said two third parts of the *Upper* and *Lower Hollybrooks*, with the appurtenances; and that the said decree should be final and conclusive to all parties.

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The said *Mary Vernon* acquiesced under this final decree; and it is apprehended, paid the 100*l.* costs, and the said 1000*l.* and interest, and put *John Vernon* into possession of two thirds of the *Upper* and *Lower Hollybrooks*; but before she executed any conveyance thereof to him and his heirs, she, in 1729, died without issue.

*John Vernon* being thus in possession of two thirds of the *Upper* and *Lower Hollybrooks*, he, on the 21st of *November*, 1707, mortgaged the same to *Thomas Vernon*, Esq; for 1000 years, to secure the repayment of 2000*l.* *bona fide* paid and advanced by him, with interest. And *John Vernon* continued in quiet possession of the said mortgaged premises, from the time the possession thereof was delivered to him by the said *Mary Vernon*, to his death in 1719.

In 1720, the said *Thomas Vernon* entered into possession of the premises; the said mortgage money, and a great arrear of interest thereon, being then due; and continued in quiet possession thereof till his death in *August*, 1726, having by his will devised all his real and personal estates whatsoever (subject to his debts and legacies) to *Jane Vernon* his widow, her heirs, executors and administrators for ever, to her and their own use; who thereupon kept and continued in the quiet possession of the said premises, till *Michaelmas* term, 1731, without any molestation whatsoever.

On the 23d of *June*, 1722, *Edward Vernon* upon whom the estate tail in equity in remainder, under the will of Colonel *Vernon*, of the town and lands of *Clontarff* and *Hollybrooks* had devolved, conveyed to the respondent his heirs and assigns, all his estate, title and interest in and to the same; and all other estates that he claimed and had a right to in reversion and remainder, under the will of the said Colonel *Edward Vernon*, upon the death of the said *Mary Vernon* without issue. And under this convey-



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Vide stat.  
6 Geo. I. c. 5.

ance, the respondent set up a title to the said lands and premises, and insisted, that the said decree of the House of Lords in *Ireland*, was of no force or effect; for that by an act of Parliament passed in *England* in 1723, it was declared and enacted, “that the House of Lords in *Ireland* have not any jurisdiction, to affirm or reverse any judgment or decree made in any Court of that kingdom; and that all proceedings before the House of Lords, upon any such judgment or decree, are and are thereby declared to be void.”

The respondent accordingly, in *Michaelmas* term, 1731, brought his ejectment in the name of *Thomas Murray*, as lessee of the representatives of the mortgagees and trustees of Colonel *Edward Vernon*, against the said *Jane Vernon* for recovery of the two thirds of *Hollybrooks*; to which she appeared and pleaded the general issue; and the heir of the surviving trustee dying, the respondent in *December*, 1734, brought a new ejectment in the name of the said *Thomas Murray*, as lessee of the then representatives of the mortgagees and trustees of Colonel *Vernon*, against the said *Jane Vernon*, for recovery of the same premises; to which ejectment she also appeared and pleaded the general issue: And in *Easter* term, 1735, the respondent obtained a verdict; and in *Trinity* term following, judgment was entered up thereon.

In *Easter* term, 1735, *Jane Vernon* brought her bill in the Court of Chancery in *Ireland*, against the respondent and the lessors and lessee in the said ejectment; setting forth the several matters aforesaid, and praying a discovery of all incumbrances upon the mortgaged premises, and what title the respective defendants claimed thereto; and that if they had any incumbrances, they might assign the same to the said *Jane Vernon*, upon payment of what should appear to be justly due thereon; and that the respondent's proceedings at law against her, might be stayed by injunction.

The said *Jane Vernon* obtained an injunction; and all the defendants having put in their answers, the cause proceeded to issue, and the respondent examined his witnesses, but Mrs. *Vernon* examined none.



In June, 1738, the said *Jane Vernon* brought her supplemental bill against the respondent and others; and thereby made *George Venables Vernon*, Esq; as heir at law of Colonel *Vernon*, a defendant; which suit proceeded to issue, but no witnesses were examined therein by the said *Jane Vernon*.

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On the defendant's moving upon the 4th of *February*, 1737, to dissolve the injunction, which the plaintiff had before obtained as of course, for want of the defendant's answering in time; the Court ordered, that on the plaintiff's giving security within a fortnight after the end of the term, to be accountable from the time of the judgment in ejectment, for the rents and profits of the lands in question, and pay costs in case they should be adjudged against her at the hearing, and to revive, in case of abatement, the injunction should be continued till the hearing of the cause, or further order; but in default thereof, that the injunction should be dissolved without further motion; and the plaintiff was ordered to speed her cause to a hearing, some time in the then next *Trinity* term; the defendants agreeing to appear *gratis*, and pray no day over.

On the 15th of *November*, 1738, the respondent obtained another order, that the plaintiff should speed her cause to a hearing, or otherwise, that the injunction should be dissolved; and which injunction being afterwards dissolved, the respondent, by virtue and in execution of the judgment he had obtained at law, was by the Sheriff put into possession of the two thirds of *Hollybrooks*.

The said *Jane Vernon*, instead of proceeding to hear her cause, presented a petition to the House of Lords in *Great Britain*, stating the several matters aforesaid, and praying leave to bring an appeal from the decree of dismissal of the 14th of *May*, 1686.

And in support of this petition it was urged, that Mrs. *Vernon* could not proceed in her cause in the Court of Chancery in *Ireland*, till this inrolled decree of dismissal was reversed, and that the only method she had to reverse it, was by an appeal to their Lordships here; but being out of time, according to the strict rule of the House, she could not bring such appeal without

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out leave, and which, considering the very peculiar circumstances of her case, she hoped to obtain; otherwise the long acquiescence of those who claimed under Colonel *Vernon*, both before and after the *British* statute concerning the House of Lords in *Ireland*, would turn to their advantage, and be the means of destroying her right. As to the objection, that the decree being inrolled was a bar to the petitioner, it was conceived to be the strongest argument why if that decree was not just, she should have an opportunity of having it rectified; but which, by its being inrolled, could not be done but by appeal. As to another objection, that the petitioner was neither a party, or privy to any of the parties to the original decree; it was insisted, that tho' she was not privy in blood or representation, yet she was in estate, as claiming under *John Vernon*, who was the plaintiff in that suit; and that this was the only material privy; and as all persons claiming under parties are bound by decrees which are right, as the parties themselves are; so they ought to have the same liberty of shewing errors in such decrees, in case they are wrong: For otherwise, there must be a failure of justice in all those cases, where the right of a party to a suit comes to another by any other way than that of legal representation; and especially in the present case, where a mortgage had been taken on the credit of a decree of the House of Lords in *Ireland*, then supposed to be good, and not declared void till near twenty years after, on the ground of a defect in jurisdiction only, which they exercised many years both before and after the decree. That tho' the petitioner could not in such appeal make the heirs at law of *John Vernon* to be joint appellants with her, against their will; yet she could make them and all other parties respondents to it, so as by the appeal to bring all matters properly in question. As to another objection which had been made, that the suit was abated, and therefore there could be no appeal till it was revived; it was apprehended to be wholly unnecessary, even where a legal representative appeals, who is not bound to revive a decree for the mere purpose of appealing from it; but in the present case, Mrs. *Vernon* being no representative, could not revive; nor was it ever heard, that an original bill in the nature of a bill of revivor, was brought to revive a suit below which had been dismissed. And as to a fourth objection, that this would be giving an original jurisdiction to their Lordships, since the petitioner's mortgage was  
not



not in issue in the suit below; it was apprehended, that this circumstance had no relation to the merits of the decree appealed from; and that their Lordships would be no more under any difficulty as to the judging of that mortgage, which was only to derive her title to bring the decree into question; than to judge of the heirship of *George Venables Vernon*, if he had brought the appeal, and his pedigree was disputed.

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The respondent opposed this application by a counter petition, stating the same facts as *Mrs. Vernon* had stated; and insisting, that though the order of the House limiting the time for bringing appeals, was out of the case, yet the original parties to the suit being dead, no appeal could be brought without first reviving the suit below; and which being entirely relative to the inheritance of lands, could only be done by the heir at law of *John Vernon*; and even was he desirous of appealing from the decree of 1686, he could not do it under the circumstances of this case, without first filing a supplemental bill, as well as a bill of revivor; stating Colonel *Vernon's* will in 1684, his mortgages to *Carter* and others, and the respondent's recovery in ejectment, and making the trustees and devisees in that will, and the representatives of the mortgagees, as well as the Colonel's heir at law, parties to such suit. But as the heir acquiesced, *Mrs. Vernon* could not bring an appeal from this decree; because her right arose under a mortgage not made till *November, 1707*, above 20 years subsequent to the date of the decree; and which right having no existence at the time of the decree, could never entitle her to appeal from it; nor could this right, such as it was, appear or come in question before the House, under an appeal from the decree of 1686, the mortgage and will under which she claimed being no part of the proceedings below; and therefore the House must exercise an original jurisdiction to let the parties into proof concerning these facts. Besides, the House could not on such an appeal, give judgment different from what was prayed by the bill on which the decree of 1686 was founded; and which, supposing that decree should be reversed, must be for *George Venables Vernon*, as heir at law of Colonel *Vernon*, to convey the inheritance of the lands of *Clontarff*, and the island adjoining, and one third of the *Hollybrooks* (to no part of which *Mrs. Vernon* claimed the least title) as well as the other two thirds of the *Hollybrooks*

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(to which she claimed to be entitled for a term of years) to the heir at law of General *Vernon*, who desired no such decree, but acquiesced under that already made; and such a decree as this could not be made on the appeal of Mrs. *Vernon*, who claimed no interest but in a small part of the premises, and that for a term of years only. But if such a decree could be made on Mrs. *Vernon*'s appeal, it would be of no service to her; the only decree she could pray, or was entitled to pray, being to have the respondent's judgment set aside, and be restored to the possession of the two thirds of *Hollybrooks*, till she was satisfied her principal and interest, or to have what remained due to her on mortgage, raised by sale of the mortgaged term; which decree was impossible to be made on *John Vernon*'s bill, or by any judgment to be given on an appeal from the decree of 1686. That the mortgage under which Mrs. *Vernon* claimed, being only for a term of years, which is a chattel interest, by way of security for a sum of money, and affecting only a very small part of the lands in question in the cause below, she could not in any view so connect her case with that of the heir at law, as to be considered as standing in his place; neither had she the same kind of right or interest in her by conveyance from the plaintiff, as the plaintiff had; hers being only a redeemable interest in a small part of the lands for a term of years, whereas the heir was entitled to the absolute inheritance of the whole. And as to Mrs. *Vernon*'s making the heir of *John Vernon*, and all other proper parties respondents to the appeal, there was no instance of any person's being permitted to bring an appeal, who had not the same right as was in the party aggrieved by the decree; nor where the House ever permitted an appeal to be brought under a new and different right from that which was, or appeared to be, in the parties below; and to make new and original parties before their Lordships, and to enter into new proofs of title, not made out in any of the Courts below, or upon which any decree had been made below, was what could not be done without exercising an original jurisdiction: And if the heir at law of *John Vernon* was to be made a party respondent, and the decree should be reversed, it must be reversed not in favour of the appellant, but of the heir as respondent, which could never be done. That if the general order of the House, for limiting the time of bringing appeals was out of the case,

yet



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yet Mrs. *Vernon* ought not to be at liberty to appeal from the decree of 1686, whilst her bill in the Court of Chancery was depending for the same matter; but she ought to have dismissed that bill before presenting her present petition; it being a settled maxim both in law and equity, that no person shall be doubly vexed in two Courts, at one and the same time for the same thing. But if Mrs. *Vernon* could by any possibility prevail upon an appeal in setting aside the decree of 1686, the suffering her to appeal in this extraordinary manner, would be putting *Carter* and the rest of Colonel *Vernon's* mortgagees, without ever hearing them, in the very situation she represents herself now to be in; though their case is infinitely stronger and much more favourable than hers; their title being under letters patent from the Crown, confirmed by act of Parliament and a judicial determination; whereas Mrs. *Vernon's* was a title, which her testator must be supposed to know to be a defective one at the time he took it; because all she relied upon was the proceedings in the House of Lords in *Ireland*, without any conveyance even from *Mary Vernon*, pursuant to the directions of their pretended decree: Besides, by *Mary Vernon's* answer in that House, she disclosed the right of the remainder-man under Colonel *Vernon's* will, and also of his mortgagees, so that *John Vernon* must know, that their right could not be barred by a judgment to which they were no parties, and he must likewise know, that the House of Lords had at that time no jurisdiction to pronounce that judgment, it having long before the mortgage been judicially determined by the House of Lords in *England*, that the House of Lords in *Ireland* had no such jurisdiction\*; and the act of Parliament in 1723, did not introduce any new law, but was only declarative of what the law was before. Lastly, that the circumstances of Mrs. *Vernon's* case were not such as should induce the House to break through all the established rules, and make an extraordinary precedent in her favour; for as she admitted a possession of the mortgaged premises for 19 years, it was impossible there could be any thing considerable remaining due to her; but for whatever might remain due, she

\* *Vide* Jour. vol. 16. p. 292. 296. and Shower's Parliament Cases. p. 78. et seq.

had



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had a right to recover it against the representatives of the mortgagor, and was entitled to receive a satisfaction, if her mortgage was real, out of his personal estate: And if she had any remedy against the respondent, or the estate in his possession, she had a bill now depending in *Ireland* against him, for that purpose, and ready for hearing; when the Court would have regularly under consideration, how far under the circumstances of her case, she was to be barred by the former decree, and when all parties interested would have an opportunity of being heard.

Jour. vol. 25.  
P. 442. 447.  
518.

Both these petitions were referred to a Committee of the Lords; who, on the 21st of *April*, 1740, reported, “that they  
“had met upon the matter, and heard one counsel of a side;  
“and upon consideration of the case, their Lordships had not  
“thought proper to report any opinion, but had directed the  
“state of the case to be reported specially to the House”. Whereupon it was ordered, that one counsel of a side might be heard at the bar of the House, in relation to this matter, if they thought fit.

— 522.

ACCORDINGLY, after hearing counsel for Mrs. *Vernon* upon the matter of the report, and also counsel for Captain *Vernon*, who in the course of his pleading waived insisting on the standing order of the House; it was ORDERED, that the petitioner, Mrs. *Vernon*, should be at liberty to exhibit an appeal from the said decree, or order of dismissal of the Court of Chancery in *Ireland*; if she thought fit.\*

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\* An appeal was accordingly brought, and the decree affirmed; 26th November, 1742. Jour. vol. 26. p. 172.



*Nathaniel Bland*, L. L. D. Deputy  
Surrogate and Commissary of the  
Court of Prerogative Royal, and Court  
of Faculties in *Ireland*, } Appellant. Case 49.

His Grace *Hugh*, Lord Archbishop of  
*Armagh*, Primate and Metropolitan  
of all *Ireland*, *Richard Morgan* and  
*William Shiel*, Esqrs. } Respondents.

15th December, 1740.

**K**ING *James* I. in pursuance of the powers vested in the Crown by two several acts of Parliament made in *Ireland*, the one in the 28th of *Henry* VIII. intituled, "An act of faculty," and the other in the 2d of *Elizabeth*, intituled, "An act, restoring to the Crown the ancient jurisdiction over the state ecclesiastical and spiritual, and abolishing foreign power, repugnant to the same;" did, by his letters patent under the Great Seal of *England*, dated the 10th of *April*, in the 20th year of his reign, grant the jurisdiction of the Court of Prerogative Royal and Court of Faculties in *Ireland*, unto *Christopher*, then Lord Bishop of *Armagh*, and his successors for ever.

King *Charles* I. by his letters patent under the Great Seal of *Ireland*, dated the 26th of *January*, in the 2d year of his reign, for the reasons and considerations therein particularly expressed, impowered *James*, then Lord Archbishop of *Armagh*, and his successors, to appoint, in the manner in the said letters patent mentioned, a sufficient person to be his or their Deputy Surrogate, or Commissary of the said Court of Prerogative Royal and Court of Faculties, and to grant such surrogation to the persons so by them to be nominated, for the term of their natural lives, or during good behaviour.

Pursuant to this power, the offices of Deputy Surrogate or Commissary of the said Courts have, ever since the time of the



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last letters patent, been constantly granted by the Archbishops of *Armagh* for the time being, for the term of the natural lives or good behaviour of the several and respective grantees, and not otherwise. And accordingly, his Grace *Michael*, Lord Archbishop of *Armagh*, did, by commission under his archiepiscopal seal, dated the 13th of *June*, 1699, nominate and appoint *Marmaduke Coghill*, Doctor of Laws, Deputy Surrogate and Commissary of the said Court of Prerogative Royal and Court of Faculties, during his natural life.

Doctor *Coghill* officiated in these offices, and held and enjoyed the same under the said commission, until the month of *January*, 1738; about which time he fell into a very bad state of health, and being advised to go abroad for the recovery of his health, and having an intention to resign the said offices, and to procure the appellant to be appointed his successor in the same; Doctor *Coghill*, about the beginning of *January*, 1738, acquainted the respondent the Lord Primate with such his intentions, and at the same time, recommended the appellant as a person thoroughly qualified in every respect, to fill the said offices; and proposed, that if his Grace should, after his, Doctor *Coghill*'s death, have just cause to be dissatisfied or displeased with the appellant's behaviour in the said offices, the appellant would, in such case, be willing to resign the same.

Upon this request and recommendation, his Grace consented to accept the resignation of Doctor *Coghill*, and to grant the said offices to the appellant. But requiring, by a letter to Doctor *Coghill*, that the appellant should execute a bond, which the appellant apprehended and understood was only intended to secure more firmly, after Doctor *Coghill*'s death, a power to his Grace over the appellant's conduct and behaviour in the said offices, in case the same should give his Grace any just cause of displeasure; and being satisfied he should never conduct or behave himself so as to give his Grace just reason to be displeased with him, and that this power would never be used but on just grounds; a draft of a bond was prepared, in the penalty of 10,000*l.* with condition, that the appellant should, on the death of Doctor *Coghill*, at the will and pleasure of the  
Lord



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Lord Primate, surrender the said commission, with the said offices, so granted to him as aforesaid, to the Lord Primate; which draft of a bond, together with the commission granted to Doctor *Coghill*, and a draft of a new commission, to be executed by the Lord Primate, were laid before his Grace, and continued in his custody until the 22d of *January*, 1738. — On the morning of which day, his Grace having expressed to the appellant his approbation of the draft of the commission and bond, the appellant waited on his Grace in the evening of that day, with Doctor *Coghill*'s resignation, which his Grace then accepted, and, at the same time, duly passed a commission under his archiepiscopal seal, containing a grant of the said offices to the appellant for the term of his life; and the appellant was accordingly sworn and admitted to the said offices, and, at the same time, executed the before mentioned bond.

On the 19th of *March*, 1738, Doctor *Coghill* died; and, within a day or two afterwards, the Lord Primate, without charging the appellant with any neglect or misbehaviour in the execution of the said offices, sent persons to him to demand an immediate resignation of them; which the appellant, not thinking proper to comply with, his Grace made a second demand, to the same purpose: And upon the appellant's persisting in his refusal to resign, his Grace, on the 19th of *May*, 1739, caused a bill to be filed in his name against the appellant in the Court of Chancery in *Ireland*; charging, among other things, that the appellant, before his admission to the said offices, had entered into an agreement with his Grace to resign the same peremptorily, on the death of Doctor *Coghill*; and that the appellant had fraudulently concealed from his Grace, the powers he had with respect to the granting the said offices; his Grace charging, that he had power to grant the same at will; and in order to shew what was the intention of the parties, at the time of granting the said commission, and executing the said bond, his Grace charged several conversations upon this head, and several parol promises, as made by the appellant to his Grace, and the respondent *Richard Morgan* his receiver, at the time of executing the bond and commission; but did not suggest any misbehaviour or other reason, why he would remove the appellant from the said offices, but his Grace's inclination



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inclination to have in himself, the absolute disposal of them: The bill therefore, prayed, that the appellant might be compelled specifically to execute the said pretended agreement, and to surrender the said offices and employment to his Grace.

To this bill, the appellant put in a plea and answer; and in his answer fully set forth the several matters before mentioned; denied the agreement pretended by the bill, and expressly averred, that there was not the least passage in all the expressions or behaviour of his Grace, which gave the appellant to understand or imagine that he was, at all events, to hold the said offices no longer than during Doctor *Cogbill*'s life, or that he was peremptorily to be displaced on the Doctor's death. For having understood from Doctor *Cogbill*, that his continuance in the said offices was to depend on his behaviour; if he had, at the time of the execution of the said commission been apprised, or had entertained any imagination or suspicion of such intention in his Grace, he would have absolutely refused to accept the said commission; he having thereupon quitted the business of his profession as an advocate, and other business, equal in profit to the income of the said offices: And that Doctor *Cogbill* (with whom, till his death, the appellant accounted for a moiety of the profits of the said offices) was, at the time of the appellant's admission into the same, in so bad health, that his physicians judged it impossible for him to live three months. And the appellant insisted, that he was all along given to understand, that he was not to resign the said offices on any other terms, than on just cause of exception to his behaviour in the offices, which he hoped had been unexceptionable: And as to that part of the bill, which prayed a specific performance of the pretended agreement, the appellant pleaded the before mentioned acts of Parliament, letters patent, resignation and commission; and that the said offices were judicial, and concerned the administration and exercise of justice, and had been always granted for life, or during good behaviour, and that the appellant was duly admitted and sworn into the said offices under the said commission, and had ever since executed the same.

On



On the 6th of *July*, 1739, this plea came on to be argued; when the Court ordered it to stand for an answer, with liberty for the plaintiff to except, and reserved the benefit thereof to the hearing of the cause.

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The answer being full, the respondent the Lord Primate took no exceptions thereto, but immediately replied; and issue being joined in the cause, his Grace proceeded to examine several witnesses, and particularly the respondents *Shiel* and *Morgan*; and the appellant likewise examined them on several cross interrogatories, exhibited for that purpose.

Publication having passed, it appeared upon a perusal of these depositions, that soon after Doctor *Coghill's* death, it was agreed, that the respondents *Morgan* and *Shiel*, who had been present with the Lord Primate, when the appellant waited upon him as aforesaid, should make affidavit of what they remembered of the several transactions and conversations that passed, upon granting the said commission to the appellant. — That the respondent *Morgan* thereupon drew a draft of such an affidavit, as he proposed to make himself, upon that occasion; and at the foot thereof, added the draft of another affidavit for the other respondent *Shiel* to make, verifying the said *Morgan's* affidavit. — That the respondent *Morgan* afterwards brought both the said drafts to the respondent *Shiel*, for his perusal and approbation; and that the respondent *Shiel*, upon his perusing such drafts, disapproved thereof, and actually refused to swear to the draft, which the respondent *Morgan* had prepared for him; declaring, that if he must make an affidavit, he would draw his own, the transaction being fresh in his memory. — That the respondent *Shiel* did accordingly, after having first seen *Morgan's* affidavit, draw an affidavit for himself, and some time in *March*, 1738, delivered the same to *Morgan*, in order to be by him laid before the respondent the Lord Primate. — That the respondent *Morgan*, some time afterwards, returned this draft to *Shiel*, and on the 26th of *April*, 1739, they both swore their affidavits before a Master in Chancery, and that the original affidavits were delivered by *Morgan* to the respondent the Lord Primate.



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It likewise appeared, that these affidavits were afterwards delivered by the Lord Primate to his agent Mr. *Samuel White*, for his guidance and direction in the prosecution of the cause against the appellant. — That the respondent *Morgan* had his affidavit, or a copy thereof, from the Lord Primate's agent, some short time before his examination in the cause; and that in many passages, the depositions and affidavits of the respondents *Morgan* and *Sbiel* were, *verbatim*, the same.

By the respondent *Morgan*'s deposition to the cross interrogatories, it was pretended, that the reason for making these affidavits, on the behalf of the respondent the Lord Primate, was, that the respondent expected the appellant, on seeing them, would find the transaction to be so well remembered, that he would desist from giving his Lordship any further trouble, and waive his pretensions to the office; and yet it was not suggested, or even insinuated throughout the whole cause, that either of these affidavits were laid before, or communicated to the appellant for that or any other purpose; but on the contrary, they were concealed from him, and never disclosed but by the examination.

It also appeared from the deposition of *Edward Sale*, Esq; a witness examined in the cause, that the respondent *Morgan* had applied to and endeavoured to persuade him, that he had declared to *Morgan*, to have heard the appellant say, he was to resign on the death of Doctor *Cogbill*; but which *Sale*, upon his examination, declared he never did hear, or any thing like it, but on the contrary said, he believed in his conscience the appellant never would have accepted the offices on such terms.

The appellant, apprehending and being advised, upon perusal of these depositions, that the behaviour of the respondents in this transaction had been unjustifiable and irregular; applied to the Court by petition, praying that the depositions of the respondents *Morgan* and *Sbiel*, to the direct and cross interrogatories, might be quashed; and that attachments might be granted against them, or for such further or other order, as the Court should think proper on the circumstances of the case: But upon the hearing of this petition on the 14th of *March*,



1739, the Lord Chancellor refused to grant the prayer of it; declaring, he saw no reason for the application.

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The appellant, therefore, appealed from this order; contending, that the testimony of witnesses ought to be free from all previous engagement or influence, and therefore ought not to be thrown into a formal narrative, and secured by affidavit in the outset of a cause. For in experience it is found to be true, that affidavits made at the instance of either party, do not always contain the whole truth of the fact, or represent all its circumstances in their true and natural light; and when once a witness has bound himself down by a relation of the fact in an affidavit, it is a restraint upon his evidence for the future, and a strong temptation, when examined, to adhere to the affidavit; tho' by mistake, forgetfulness, or otherwise, it should happen to vary from the truth. That these affidavits had been applied to a very unjustifiable purpose, being used as instructions and assistances to the witnesses, at the time of their examination; for upon comparing the affidavits with the depositions, it appeared, that in several passages they were, *verbatim*, the same; in others, there was a variation in form indeed, but not in substance; and in general it was visible, that the affidavits were the plan upon which the depositions were framed. That if an attempt of this kind was to be endured, it would be the constant practice as soon as a cause began, to get affidavits from the witnesses, and then draw the interrogatories from them, and at the commission, turn the affidavits into a deposition; which would be of the most dangerous consequence to the truth and justice of every cause. That in the present case, there was not the least reason or occasion for requiring an affidavit from the witnesses; for as no incident in the cause made it necessary, so the reason given for it in *Morgan's* deposition, was not only weak and improbable, but also untrue; it being manifest, that the affidavits were not calculated for the purpose therein suggested, because they were never applied to that purpose; nor could they be designed merely to preserve the remembrance of the transaction, or to refresh the memory of the witnesses at the time of examination, because a minute or memorandum in writing, without the sanction or formality of an oath, would have answered both these purposes, as well as an affidavit.

J. Browne.

W. Murray.

That



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That the respondents *Morgan* and *Sbiel* knew from the beginning, they were intended to be examined in the cause, and therefore they ought to have kept themselves free and unengaged as to their testimony, according to the duty which, as witnesses, they owed to the Court, and to the parties in the cause. But, instead of behaving with indifference, they had acted with great partiality, by making voluntary affidavits in favour of the other respondent, and putting them into his power, to be used in the progress of the cause; and especially the respondent *Morgan*, who was not satisfied with making such affidavit himself, but had prepared the draft of such a one for the other respondent *Sbiel*, as he would not venture to swear. It was therefore hoped, that the depositions would be suppressed, and the witnesses justly censured.

D. Ryder.

J. Strange.

On the other side it was said, that the affidavits were sworn before any suit was commenced, and were excused, if not rendered necessary, by a case handed about in favour of the appellant; representing, that he had been hardly dealt with by the Lord Primate. That these affidavits were made by persons of reputation and character, and who were the proper persons to attest what passed in their presence; and that the whole appeared to be a very innocent transaction. That the exception, if any, could only go to the credit of the witnesses, upon the hearing of the cause; the appellant having not only cross examined them, but consented, after publication, that the cause should be heard, without objection to the depositions. And therefore it was hoped, that the order rejecting the appellant's petition, would be affirmed, and that the appeal would be dismissed with exemplary costs; as it seemed to be brought merely for the purpose of delaying the hearing, and keeping possession of the offices in question.

ORDER  
affirmed.  
Jour. vol. 25.  
p. 555.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Between



Between *John Parkhurst*,  
Esq; and Others, } Plaintiffs  
*Joseph Smith*, on the Demise }  
of *John Dormer*, Esq; } Defendant

Case 50.

in Error.

23d February, 1740.

**M**R. *Dormer*, having failed in recovering upon the former  
ejectment, brought in the name of *Berrington*, brought  
another in the name of the present defendant *Smith*, for the  
same estates; and upon the trial of this second ejectment, at  
the bar of the Court of King's Bench, by a special jury in *Mi-*  
*chaelmas* term, 1738; a special verdict was found, stating the  
several facts found by the former verdict, with this addition,  
*viz.* that Mr. *Dormer* made five several actual entries upon the  
premises in question; the first on the 6th of *January*, 1731;  
the second on the 6th of *October*, 1732; the third on the 1st of  
*January*, 1732; the fourth on the 5th of *October*, 1733; and  
the fifth on the 10th of *November*, 1735. And that on the  
20th of the same month, he made the demise in the declaration  
mentioned.

Vide ante,  
P. 353.

Viner, vol. 18. }  
P. 413. ca. 8. } 1.  
3 Atkyns 135. }  
Fearn's Con-  
ting. Rem.  
155.  
Strange 1105.  
S. C. but not  
S. P.

This special verdict was twice argued in the Court of King's  
Bench; and the question was, Whether the common recovery,  
suffered by *Robert Dormer* and *Fleetwood* his son, in order to  
defeat the limitations in the settlement of 1662, under which  
the lessor of the plaintiff claimed, was good, for want of a good  
tenant to the precipe? For if the recovery was not good, then  
the limitations in the settlement would take place, and the lessor  
of the plaintiff would be entitled under it; as it appeared by  
the special verdict, that all the intermediate remainder-men,  
between *John Dormer*, who made the settlement, and the fa-  
ther of the lessor of the plaintiff, were dead without issue male:  
And the Court, upon mature deliberation, were unanimous in  
opinion, that the lessor of the plaintiff was entitled, under the  
settlement of 1662; the remainder therein limited, not being  
barred by the recovery, as there was no freehold in the tenant,  
against whom the recovery was had; and gave judgment accord-  
ingly.



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D. Ryder.

J. Strange.

The defendants therefore brought a writ of error in Parliament, to reverse this judgment; contending, that the estate being limited to the trustees, *after the death of Mr. Justice Dormer, during his life*, was a void limitation, because it could never take effect in possession; and that it could not be made good by rejecting the words *after his death*, because the sense would not be compleat without them. That there was no instance upon the construction of deeds, where such material words, which are used by the parties to denote when the estate shall take effect in possession, have ever been rejected; nor could the words *after the death of Robert Dormer*, by any construction be taken to signify *after the end of the term*; because by express words, the estate was limited *after the end of the term*, to the first son of *Robert Dormer* in tail; and which express limitation must prevent any such construction, even by implication. That if the limitation to the trustees should not be void, but the words *after the death of Robert Dormer*, might be rejected, and the limitation to the trustees take effect in the disjunctive, viz. *or other sooner determination of the term*; yet it was conceived, that the trustees, by force of those words, took no *vested* remainder, but their estate remained *in contingency*; for no remainder can be said to be vested, unless it be so limited as to come into the possession of the remainder-man, upon every determination which may happen of the particular estate; but the words, *other sooner determination of the term*, cannot extend to a determination of the term by effluxion of time, because the estate, *after the end of the term* (which in a legal sense always signifies after the end by effluxion of time) is by express words limited to the first son of *Robert Dormer*; so that the words *other sooner determination*, can extend only to a determination of the term by surrender or forfeiture, which might or might not happen.

It was admitted, that when a remainder is limited to take effect in possession upon an event *which of necessity must happen*, such remainder will vest; but if it be limited to take effect in possession, upon an event *which may never happen*, then it does not vest. Now, it was not an event which must necessarily happen, that Mr. Justice *Dormer's* term should end by surrender or forfeiture, because it might determine by effluxion of time or death: So that the present case was no more than this, viz.

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a limitation to Mr. Justice *Dormer* for 99 years, if he so long live; and if his estate shall determine by surrender or forfeiture, ('tis the same thing, for the conditional word *if* makes no difference) then to the trustees during his life, and which was plainly no more than a contingent remainder; the consequence of which must be, that on the death of Sir *William Dormer*, the freehold vested in *Fleetwood* the son of Mr. Justice *Dormer*, and consequently was well conveyed, by the fine to the tenants to the precipe, and the recovery was well suffered. That this construction of the limitation to the trustees, was most agreeable to, and best answered the intention of the parties to the settlement; the end and design of appointing trustees to preserve contingent remainders in this and all other marriage settlements, being only to give them a right to enter, upon any conveyance made by the particular tenant for life or years, to destroy the contingent remainders *before they arise*; but not to prevent the particular tenant and his son, who *has* a vested remainder in tail, from suffering a common recovery. And if this limitation be construed not to vest any estate in the trustees, it gives the father and son no more power over the estate, than they have when the father is made tenant for life; for in that case, altho' there be trustees to preserve contingent remainders, yet the father and son, in the life of the father, and without the trustees joining, can bar all the subsequent remainders. But by construing the freehold to be in the trustees, when the father is only tenant for years, tho' his first son is of age; no settlement can be made on the marriage of the son, or for payment of the debts of the family, tho' the father and son join, without the consent of the trustees, which would be very inconvenient; and it was apprehended, that it would have been no breach of trust, if the trustees had joined in suffering the recovery. Supposing however the freehold to be in the trustees, yet by the fine levied by *Robert Dormer* and *Fleetwood* his son, *Dormer Parkhurst* and *John Parkhurst*, were made good tenants to the precipe: For it must be admitted, that if the estate had been conveyed by *Robert Dormer* and *Fleetwood*, to *Dormer* and *John Parkhurst* by a feoffment upon the land, they would have had the freehold without the trustees joining, and in that case the recovery would have been good; and it was apprehended, that the fine had the same effect, such a fine being in many books called a feoffment upon record, and no where judicially determined



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determined to be otherwise; and if the freehold passed by the fine, then also the recovery was well suffered. That in the present case, the daughters of the said *Robert Dormer*, who were in possession of the estate by virtue of this recovery, were the granddaughters of *John Dormer* who made the settlement, and the heirs of *Robert* the father, and *Fleetwood* their brother, who was the remainder-man in tail, and joined in the recovery, and for whose benefit the trustees were created; whereas Mr. *Dormer*, the lessor of the plaintiff, was only a collateral relation, and the most remote remainder-man in the whole settlement. For these reasons therefore it was hoped, that the judgment given in his favour, would be reversed.

F. Chute.

T. Bootle.

On the other side it was argued, that the title of the lessor of the plaintiff to the premises in question, was clearly found; it appearing by the special verdict, that the several intermediate remainder-men between him and *John Dormer*, who made the settlement, were all dead without issue. That the estate limited to the trustees to preserve the contingent remainders, was a vested remainder to take effect in possession during the life of *Robert Dormer*, upon the determination of the particular estate limited to him for 99 years, either by effluxion of time, forfeiture, or surrender: And though that part of the limitation, which depended upon the contingency of *Robert Dormer's* death, was of no operation or effect, to vest an estate in possession in the trustees, on that single event; yet as the particular estate for 99 years might determine in his life-time, by either of the other events happening, *i. e.* forfeiture or surrender, the remainder vested in the trustees took effect in possession; and a remainder so limited is well warranted by the rules of law, and is neither void or contingent. That to make this a contingent remainder from these words, *or at her sooner determination*, would be contrary to the established notion of what the law calls a contingent remainder; for such a remainder can only be one of these three ways; either where the person to whom it is limited is not in *esse*; or where the particular estate may determine, before the remainder can take place; or where some collateral accident must happen before it can take effect. But none of these fell out in the present case: For the person to whom the estate was limited, *viz.* the trustees, were existing. — The remainder to them would take effect immediately upon the determination of the particular estate by  
surrender,



surrender, or forfeiture. — And here was no collateral accident to happen before it could take place; but only such as made a determination of the particular estate, and what was implied in its very creation. The words *or other sooner determination*, are what are implied in every term for years, and to which every term is subject by surrender or forfeiture; they are no other than what are made use of in all common limitations of estates to trustees to preserve contingent remainders, in every settlement. To put therefore such a construction upon these words, as to make the estate arising from them to the trustees a contingent remainder, would disappoint the very end proposed by them; it would frustrate the intention of the parties, and endanger most of the family settlements in the kingdom. For that the design of this limitation to the trustees, was to preserve the contingent remainders from being destroyed, was evident from the settlement itself; and that it was the intention of him who made the settlement, to preserve and continue this estate in the male line of the family, was most manifest from this; that he limited it to the male line in a remote degree, in preference to the daughters of his eldest son Sir *John Dormer*, who were his heirs at law.

Now taking it that the estate limited to the trustees, was a vested remainder in them, to take effect in possession upon the determination of the particular estate limited to *Robert Dormer*, as it plainly was, this puts an end to all other questions; for then the case, taken abstractedly from the fine, stands thus: — *Robert Dormer*, tenant for 99 years, if he so long live, and from and after the determination of that term, then to trustees and their heirs, during the life of *Robert Dormer*; remainder to *Fleetwood* his son in tail; he and his son suffer a common recovery. Considered as the recovery of *Robert Dormer*, it is void; because, he being only tenant for years, could not give a freehold to another; and without which, there could not be a good tenant to the precipe; for to make him so, he must have a freehold in him. And taking it as the recovery of *Fleetwood* the son, it fails; the freehold being in the trustees, and not in him, he having only a remainder expectant on the determination of their estate. — And as to the fine levied by *Robert Dormer* and *Fleetwood* his son, which has been insisted on to answer the supposition of a freehold gained that way, it stands



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thus: Considered as the fine of *Robert*, it is void for want of freehold; it being settled beyond all doubt, that a fine by tenant for years operates nothing, and is absolutely void: And considered as the fine of *Fleetwood*, it is equally so for want of a freehold in him; it being equally clear, that none can levy a fine but he who has a freehold in possession.

After hearing counsel on this writ of error, it was proposed to ask the Judges their opinions on the two following questions; viz. I. "Whether the remainder limited to the first son of *Euseby Dormer*, was good in its original creation, or not?" II. If good, whether it was well barred by the fine levied by *Mr. Justice Dormer*, and his son *Fleetwood Dormer*, and the recovery suffered by the said *Fleetwood Dormer*?"

The Judges having taken time to consider, the Lord Chief Justice of the Court of Common Pleas acquainted the House, "that the Judges had considered the said questions, and though they all agreed in opinion, yet as this cause was elaborately spoken to by the counsel at the bar, it was apprehended, their Lordships might expect the Judges should give their reasons, as well as their opinions:" And accordingly, the Lord Chief Justice delivered the reasons of the Judges at large, with their unanimous opinions upon the points of law to them proposed.\*

JUDGMENT  
affirmed.  
Jour. vol. 25.  
p. 602. 605.

WHEREUPON, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, should be affirmed, and the record remitted: And it was further ORDERED, that the plaintiffs in error should pay to the defendant in error, 10*l.* for his costs.

\* It is not easy to discover from this entry in the journal, what were the opinions of the Judges upon these two questions; but *Mr. Tracy Atkins* having given the whole of the Lord Chief Justice's argument on this occasion, vol. 3. p. 135, it appears from thence, that the Judges were clearly of opinion, that the limitations to the first and other sons of *Euseby Dormer*, were good remainders; and that the fine and recovery were no bar to them.

Richard,



*Richard, Earl of Ross, in Ireland,* - Appellant.

Case 51.

*Elizabeth Worsop, otherwise Wood, Widow, Worsop Bush and Noab Webb,* } Respondents.  
Esqrs; - - -

17th March, 1740.

SIR *Thomas Worsop*, Knt. having married *Elizabeth*, the aunt of *Richard*, Lord Viscount *Ross*, the appellant's father, got possession of the manor, town and lands of *Dunshagblin* and *Rosetown*, with the appurtenances, in the county of *Meath*, in *Ireland*, towards payment of the said *Elizabeth*'s portion; and after the same was paid off, still continued to enjoy the premises, by agreement with the mother and guardian of the Viscount, during his minority.

Soon after the Viscount came of age, Sir *Thomas*, upon a pretence that he had laid out 1000*l.* in buildings and other improvements on the premises, prevailed on the Viscount to grant him a lease thereof for three lives, renewable for ever: And accordingly, by indentures of lease and release, dated the 26th and 27th of *May*, 1682, the Viscount, in consideration of love and affection to his aunt, and of 1000*l.* recited to have been laid out in improvements on the premises, pursuant to former agreements, and of 57*l.* 10*s.* then paid as a fine, granted and conveyed the said premises to Sir *Thomas Worsop* and his heirs, during the natural lives of *John Worsop* and *Thomas Worsop*, first and second sons of Sir *Thomas*, and of *Elizabeth Worsop*, his fourth daughter, at the yearly reserved rent of 200*l.* payable half yearly.

By this deed, the Viscount covenanted, that he, his heirs and assigns, on failure of any of the said lives, or those thereafter to be added, and on payment of 100*l.* as a fine, and nominating a life to be added in the place of such life so falling, within six months after such failure, and paying the arrear of rent then due, would from time to time for ever renew the lease to the said Sir *Thomas Worsop*, and his heirs. — And Sir *Thomas* thereby covenanted for



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for himself and his heirs, with Lord *Ross*, that he and they, on failure of every of the lives named in the said lease, or to be added, should, on nominating a new life as aforesaid, to be inserted in the place of every life so falling, pay to Lord *Ross* at the *Tbolfell* of the city of *Dublin*, the sum of 100*l.* over and above the annual rent, within six months after the failure of every such life.

But it was expressly provided, that if it should happen, that upon the failure of any of the lives therein nominated, or to be nominated as aforesaid, the said Sir *Thomas Worsop*, his heirs, executors, administrators, or assigns, should not pay the said *Richard*, Lord Viscount *Ross*, his heirs or assigns, for every life so failing as aforesaid, the said full and entire sum of 100*l.* at the *Tbolfell* as aforesaid, within six months after the failure of such life; and should not also within six months, nominate the life of some other person in lieu thereof, to be added to the time and term of the said grant; then and for ever after such failure, on the part of the said Sir *Thomas Worsop*, his heirs, or assigns, it should and might be lawful to and for the said Lord Viscount *Ross*, his heirs, executors, administrators and assigns, to sue for the said 100*l.* or else at his election, for ever after to deny and refuse the making of such renewal, by adding any other life or lives to the time and term of the said grant: And that in case the said Sir *Thomas Worsop*, his heirs and assigns, should not, within the time aforesaid, pay the said sum of 100*l.* for each life so to be added, and nominate such life, within the time aforesaid; then the said premises, from and after the determination of the lives then in being, should be and remain to the use of the said Lord Viscount *Ross*, his heirs and assigns for ever.

On the 27th of *May*, 1686, *Thomas Worsop*, one of the three lives, died; and by indenture, dated the 26th of *November*, 1686, between the Lord *Ross* and Sir *Thomas Worsop*, *Anne Worsop*, his youngest daughter, was named in the stead of the said *Thomas Worsop*, who died without issue.

About *January*, 1688, Sir *Thomas Worsop* died; and on the 2d of *January*, 1689, *John Worsop*, his son and heir, and one other of the lives in the release named, died without issue; and



and by indenture, dated the 10th of *February*, 1690, between the Lord Viscount *Ross* of the one part, and Dame *Elizabeth Worsop*, widow and relict of Sir *Thomas Worsop*, *Lettice Worsop*, *Thomas Toller*, Esq; and *Dorothy* his wife, and *Elizabeth* and *Ann Worsop*, (which *Lettice*, *Dorothy*, *Elizabeth* and *Ann*, were four of the daughters of Sir *Thomas*, and the said *Elizabeth* and *Ann* were two of the lives then in being) of the other part; *Elizabeth Hoey* was named in the stead of the said *John Worsop*, deceased.

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Dame *Elizabeth Worsop* died about *October*, 1695, and *Lettice Worsop* also died without issue; whereby the interest in the premisses under the said indentures of lease and release, became vested in *Elizabeth*, *Dorothy* and *Ann Worsop*, as sisters and coheirs of the said *John Worsop*, the son and heir of Sir *Thomas Worsop*.

*Elizabeth Worsop* intermarried with *John Wood*, the younger, Esq; and *Dorothy* intermarried with *Thomas Toller*, who, in 1695, sold their interest in the premisses to Dean *Noah Webb*; and *Ann* intermarried with *Arthur Bush*, and died on the 23d of *November*, 1693, leaving issue one son, the respondent *Worsop Bush*. — The said Dean *Noah Webb* also died, having first made his will, and thereby devised his interest in the premisses to his wife *Deborah*, during her life, and after her decease, to his son *Henry Webb* and his heirs.

After the death of *Ann Bush*, one of the *cestui que vies*, application was made by *Arthur Bush* her husband, to Lord *Ross*, who was then in *London*, to renew the lease, which he promised to do upon his return to *Ireland*; and that no advantage should be taken of any lapse in the mean time.

Soon after this conversation, one *Fitzgerald*, Lord *Ross*'s agent, wrote a letter to Mr. *Bush*, informing him, that he had orders from his Lordship to receive the rent in arrear, and also the fine for renewal; but as Lord *Ross* was indebted to one *Darby*, he desired that *Bush* would accept bills drawn upon him, payable to *Darby*. Accordingly in *February*, 1694, two bills were presented to *Bush*, one for 52*l.* 10*s.* and the other for 47*l.* 10*s.* making together 100*l.* which he accepted; and one of these bills was mentioned to be for the rent of the lands,



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and the other in part of the fine; but neither of them was ever tendered to Mr. *Busb* for payment.

In 1695, Lord *Rofs* returned to *Ireland*, when he was again applied to for a renewal, and a deed was tendered to him for that purpose, together with 100*l.* as the fine; but his Lordship would not at that time, either execute the deed, or receive the fine. Whereupon Mr. *Busb* wrote a letter to Lord *Rofs* upon the subject, and receiving no answer, he, in 1697, applied to his Lordship personally, and having made him sensible of the injustice of his refusal, he obtained a second promise from him that he would renew; and the Notary Public whom his Lordship employed, and who had prepared the deed which had been tendered to him, was then sent for; but not happening to be in town, Lord *Rofs* expressed some concern, and assured *Busb* that he would execute the deed whenever the notary returned.

But notwithstanding all this, Lord *Rofs* refused to renew, and insisted upon the lapse of time which had happened while he was in *England*; and therefore, in *Trinity* term, 1701, *John Wood*, (whose life had been named in the room of *Ann Busb*) and *Elizabeth* his wife, *Worsop Busb*, son and heir of the said *Ann*, *Deborah Webb*, widow and relict of *Dean Noab Webb*, and *Henry Webb*, son of the said *Noab* and *Deborah*, exhibited their bill in the Court of Exchequer in *Ireland*, against the Lord Viscount *Rofs*; stating the several applications and promises for a renewal, and praying that Lord *Rofs* might be compelled to receive the 100*l.* and execute an instrument of renewal for the life of *John Wood*, in the room of the said *Ann Busb*, deceased.

To this bill Lord *Rofs*, on the 18th of *June*, 1702, put in his answer and plea; by his answer he admitted, that he was in *England* at the death of *Ann Busb* in *November*, 1693, and did not return to *Ireland*, till the summer of 1695; but insisted on the plaintiffs having neglected to name a new life, and pay the fine within the six months limited by the release; and that as the fine was to be paid at the *Tholsell* in *Dublin*, the plaintiffs might have tendered it there, and needed not to follow him to *England*, to make him a personal tender of it. He denied the several promises of renewal, charged by the bill. — And



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as to the specific relief thereby prayed, Lord *Ross* pleaded, that in the release to Sir *Thomas Worsop*, over and above the covenants and agreements in the bill set forth, there was another covenant in the following words; viz. “ And the said Sir *Thomas Worsop*, for himself, his executors, administrators and assigns, doth hereby covenant, grant and agree to and with the said *Richard*, Lord Viscount *Ross*, his heirs, executors, administrators and assigns, that he the said Sir *Thomas Worsop*, his heirs, executors, administrators and assigns, or some of them, shall and will, from time to time, and at all times hereafter, upon the failure of every life of every several person or persons within the term of this lease nominated, or to be nominated as aforesaid, for every life so failing, satisfy and pay unto the said *Richard*, Lord Viscount *Ross*, his heirs, executors, administrators and assigns, the full and entire sum of 100*l.* sterling, at the *Tholsell* in the city of *Dublin*, over and above the annual rent hereby reserved, within six months after the failure of every such life; and every such payment of such sum of 100*l.* to be made without any deduction or defalcation, for or by reason of assessments, subsidies, or any other charges whatsoever, chargeable on landlord or tenant, as aforesaid. Provided always, that if it shall happen, that upon the failure of any such life herein above nominated, or to be nominated as aforesaid, the said Sir *Thomas Worsop*, his heirs, executors, administrators or assigns, shall not pay the said *Richard*, Lord Viscount *Ross*, his heirs or assigns, for every life so failing as aforesaid, the said full and entire sum of 100*l.* at the *Tholsell* as aforesaid, within six months after the failure of such life, and shall not also within the said six months, nominate the life of some other person in lieu thereof, to be added to the time and term of this present grant as aforesaid; that then and for ever after such failure on the part of the said Sir *Thomas Worsop*, his heirs or assigns, it shall and may be lawful to and for the said *Richard*, Lord Viscount *Ross*, his heirs, executors, administrators and assigns, to sue for the said sum of 100*l.* or else, at his election, for ever after to deny or refuse the said Sir *Thomas Worsop*, his heirs, executors, administrators and assigns, to add, nominate or put any other life or lives to the time and term of this present grant, other than the life or lives which then shall be in  
“ being :



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“ being : And in case the said Sir *Thomas Worsop*, his heirs and  
 “ assigns, shall not, within the time or times hereby limited  
 “ and agreed, pay the said sum of 100*l.* for each life so to be  
 “ nominated, and nominate each life so to be added within  
 “ the time aforesaid ; that then the premisses, from and after  
 “ the determination of the lives then in being, shall be and  
 “ remain to the use of the said Lord Viscount *Ross*, his heirs  
 “ and assigns.” — He further pleaded, that the said Sir *Thomas Worsop* dying before the said *Ann*, the heirs, executors, administrators or assigns of the said Sir *Thomas*, did not within six months after the death of the said *Ann*, pay or tender to the said Viscount, or his assigns, the said fine of 100*l.* over and above the annual rent, at the *Tholsell* in *Dublin*, or elsewhere, nor within the said six months, nor in some years after nominate a new life, whereby the said Lord Viscount was at liberty, for ever after, to refuse to add any other life ; and the said premisses, after the determination of the lives then in being, were by the said indenture, limited to remain to the said Lord Viscount, his heirs and assigns for ever. And that after failure made of paying the said money, or nominating any new life, he made his election, as he then did, and declared that he would not renew the said lease.

This plea was argued on the 24th of *November*, 1702 ; when it was ordered, that the plea should be reserved with the costs, till the hearing of the cause, with liberty for the plaintiffs to reply.

Soon afterwards Lord *Ross* died, leaving the appellant, his eldest son and heir, a minor ; who thereupon became seised in tail of the reversion of the premisses, subject to the said lease for lives, during the continuance of the lives then in being, by virtue of a settlement made by his father in 1682, and not as his heir at law.

The respondents took no step in the cause, from the time of arguing the plea in 1702, till *Hilary* term, 1718, when they exhibited their bill of revivor against the appellant, but did not proceed thereon ; and on the 27th of *May*, 1725, amended their said bill, and made *Francis Bernard*, *Theobald Butler* and *John Butler* (to whom the appellant had conveyed the premisses upon several



several trusts, in pursuance of an act of Parliament) defendants; to which bill the appellant, on the 3d of *February*, 1726, put in his answer, and thereby insisted, that the respondents had lapsed their time for renewal, and hoped he should not be compelled to add a new life instead of a former, which, by the bill, appeared to have fallen above 33 years before.

On the 7th of *January*, 1729, *Elizabeth Hoey*, who had married one *Roth*, and was the life added in the room of *John Worsop*, died. — Afterwards *Deborah Webb* died, and also *Henry Webb*, leaving *Noah Webb*, his eldest son and heir; and on the 1st of *April*, 1730, *John Wood*, the life named by the respondents in their bill to be added in the room of *Ann Bush*, likewise died: Whereupon the respondents, on the 31st of *March*, 1731, exhibited another bill of revivor, and also a supplemental bill against the appellant, and the said *Francis Bernard* and *John Butler*, the said *Theobald Butler* being then dead, in order to compel the appellant to add the life of *Richard Toller*, for that purpose named in this last bill, in the room of the said *John Wood*, and to receive the fine of 100*l.* for such renewal. But the respondents, in this bill, took no notice of the death of *Elizabeth Hoey*, who died in *January*, 1729, nor sought to have any new life inserted in her place, though they had notice thereof.

To this bill the appellant put in his answer, and thereby insisted on the benefit of his father's plea, and that he was not now obliged to renew, the respondents having lapsed their time.

The cause being at issue, the respondents examined several witnesses therein. And on the 27th of *June*, 1738, they exhibited another bill against the appellant, setting forth the several matters aforesaid, and that they had named *Worsop Bush*, as a new life in the room of the said *Elizabeth Hoey*, and had caused a tender to be made to the appellant of 100*l.* for adding the life of the said *Worsop Bush* in the premises, in the room of the said *Elizabeth Hoey*, deceased; and prayed, that the appellant might be compelled to receive the said 100*l.* and add the life of the said *Worsop Bush* in the premises. To which bill, the appellant put in his answer, and insisted on the plea and



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answer put in by his father to the former bill, and on the several matters set forth in the appellant's former answers, and the long acquiescence of the respondents, without any suit for renewal, in bar of all the relief prayed by them.

This cause being likewise at issue, the respondents examined several witnesses, and both the causes coming on to be heard together on the 2d of July, 1740, the Court over-ruled the plea put in by the appellant's father, and decreed that the respondents should bring into Court the sum of 100 l. sterling, being the fine due to the appellant's father for renewing the lease of the lands of *Dunshagblin* and *Rosetown*, on the death of *Ann Worsop*, otherwise *Bush*, who died on the 23d of November, 1693, with legal interest for the said 100 l. to be computed from the end of six months, next after the death of the said *Ann Worsop*, otherwise *Bush*, for the use of such of the representatives of the appellant's father, as should be entitled thereto; and that the respondents should also pay to the appellant a further sum of 100 l. being the fine due for renewing the said lease, on the death of *Elizabeth Hoey*, otherwise *Roth*, who died on the 8th of January, 1729, with interest to be computed from the end of six months next after the death of the said *Elizabeth Hoey*, otherwise *Roth*; and that the respondents should likewise pay to the appellant a further sum of 100 l. being the fine due for renewing the said lease, on the death of *John Wood*, Esq; who died on the 1st of April, 1730, with interest to be computed from the end of six months next after the death of the said *John Wood*; the interest of the said three several sums, to be paid and computed at the rate that money bore interest, from time to time, by act of Parliament in *Ireland*; and that the respondents should also pay to the appellant all arrears of rent due for the premises: And the Court further decreed, that thereupon the appellant should execute a renewal of the original lease of the premises to the respondents and their heirs, for and during the lives of the said *Elizabeth Worsop*, otherwise *Wood*, widow, one of the *cestui que vies* in the original lease, *Worsop Bush* and *Richard Toller*, Esqrs. and the life of the longest liver of them, at and under the yearly rent, and subject to the several clauses in the said original lease mentioned and contained.

From





D. Ryder.

J. Browne.

From this decree Lord Ross appealed; contending, that it was the express agreement of the parties, that if Sir Thomas Worship, his heirs or assigns, did not, within six months after the death of a *cestui que vie*, pay the 100*l.* fine, and also name a new life; that then the Earl and his heirs were to have their election, either to sue for the 100*l.* or for ever refuse a renewal: That a Court of Equity ought not to dispense with a lapse of time, in cases of this nature; because it was not a matter of form or circumstance, but a substantial and valuable part of the agreement, that the time for renewal should be fixed within a certain period, and that the fine should be paid, and the life named within the time appointed; for to prolong the nomination of a life, is to take away the chance of the death of a *cestui que vie*, if named in time, and the fine attendant thereon, during the suspense of such nomination. Besides, it gave the advantage of the contingency from the landlord to the tenant, against the express stipulation of the parties; and would encourage tenants to use all delays that invention could suggest, if they were sure of finding relief in a Court of Equity against a lapse of time, to renew the estate. That the proviso was not calculated for a penalty or condition to enforce a performance of any part of the agreement, and upon that ground subject to relief in a Court of Equity, but was intended to be strictly and precisely executed; and the rather, because there was not a mutual stipulation for a renewal: The Earl and his heirs were, indeed, bound to renew, upon payment of the fine and naming a new life, within the time for that purpose limited; but Sir Thomas Worship and his heirs, tho' liable to the payment of the 100*l.* upon the death of a *cestui que vie*, were not obliged to add any farther life, or accept of a renewal; and if the appellant was not to take a legal advantage of the proviso, he would be without remedy in this respect. That this was not a case which lay in compensation, for the damage which might be sustained by dispensing with a lapse of time, being merely eventual, and depending upon contingencies incapable of being estimated with any certainty, no proper equivalent or compensation could be given in lieu of it. And that the supposed promise or declaration of the late Lord Ross, dispensing with the time limited for the nomination of a new life in the room of Ann Bush, was supported by the evidence of one single witness, father of



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one of the respondents, and examined to a supposed conversation upon an accidental meeting in the street, above 35 years before the examination; whereas it was expressly denied by Lord Ross's answer, and attended with great improbabilities; and it was apprehended, that such parol evidence would be productive of all the mischiefs intended to be avoided by the statute of frauds and perjuries.

J. Strange.

W. Murray.

On the other side it was insisted, that the respondents came properly into a Court of Equity, for a specific performance of Lord Ross's covenant to renew, according to the true intent and meaning of the parties; and that many decrees had been made for the specific performance of such covenants, and especially in *Ireland*, where these perpetual leases are frequent. That upon the death of *Ann Bush* (the only life upon the failure of which a formal tender and nomination in time was not made) the condition on which the lessees became entitled to have another life added, was substantially and in equity performed, application having been made to Lord Ross for that purpose, within about a month after her death; but the actual renewal was deferred till his return to *Ireland*, at his own desire, and upon his express promise to take no advantage of the six months expiring in the mean time; for otherwise, the nomination of the life, and the proper instruments would have been procured from *Ireland*, before the six months could have expired; and it would be contrary to justice, to suffer a man to take advantage of his own wrong. That the bills drawn upon Mr. *Bush* by Lord Ross's agent, and accepted, and his Lordship's promises to renew, made to Mr. *Bush* in *Dublin* in the year 1697, when the Notary was sent for; were not only a confirmation of the original agreement to renew, notwithstanding the expiration of the six months; but ought to be considered as an election made within the terms of the proviso, rather to take the 100*l.* fine, than to vacate the lease; and amounted to a waiver of any legal advantage arising from the lapse of time, if any such advantage had been gained before. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

ACCORD-



ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents 100*l.* for their costs, in respect of the said appeal.

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DECREE affirmed.  
Jour. vol. 25.  
p. 629.

*Richard*, Earl of *Anglesey*, - Appellant. Case 52.

*Charles Annesley*, Esq; - Respondent.

10th March, 1741.

**A**RTHUR, the first Earl of *Anglesey*, had issue *James*, afterwards Earl of *Anglesey*, *Altham*, afterwards Lord *Altham*, *Richard*, who likewise was afterwards Lord *Altham*, *Charles* and *Arthur*. — *James*, the eldest son, had issue *James*, *John* and *Arthur*, who were successively Earls of *Anglesey*, and who all died without issue male. — *Altham* died without issue. — *Richard* had issue *Arthur*, who died without issue, and the appellant. — *Charles* had issue only the respondent. — And *Arthur*, the youngest son, died without issue.

The first Earl *Arthur* being seised of several manors, towns and lands in *England*, *Wales* and *Ireland*, did, on the intermarriage of *James*, his eldest son, with Lady *Elizabeth Manners*, execute a settlement, dated the 18th of *September*, 1669, by which he and his said son were both made tenants for life, with remainder to the first and every other son of *James*, the son, in tail male; with remainders over.

The third Earl *James*, after the deaths of his grandfather and father, levied fines and suffered recoveries of several parts of the estates; and being thereby seised in fee thereof, he made and published at different times, two wills and six codicils, containing several repugnant and contradictory dispositions of his said estates; under some of which the appellant, and under others the respondent, would become entitled to the bulk of the estate, upon failure of issue male of *Arthur*, the last Earl of *Anglesey*.



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For by the first will, dated the 14th of *May*, 1701, he, *inter alia*, devised all those honours, manors, lands, tenements and hereditaments whatsoever, in the kingdom of *Ireland*, of which he had levied any fine, or suffered any recovery, or of which he was seised in fee simple, and could dispose of, to trustees; first to pay his debts, and after payment thereof, to his brother *Arthur*, for life, who was afterwards Earl of *Anglesey*, and to his first and other sons in tail male; remainder to *Richard* Lord *Altham*, his uncle, the appellant's father, for life, and to his first and other sons in tail male; remainder to his other uncle *Charles Annesley*, the respondent's father, for life, and to his first and other sons in tail male; remainder to his own right heirs.

And by a codicil, dated the 23d of *November* following, reciting the above will, and that he did not intend to alter the same otherwise than by this codicil, and that he had since suffered recoveries of other parts of his estates; he devised all his manors, lands, tenements and hereditaments whatsoever, in *England* or *Wales*, of which he had suffered recoveries, or which were in his power to dispose of, to trustees, to the use of his brother *Arthur* for life; remainder to his eldest and other sons in tail male; remainder to such persons, and with such powers, as the estate by his said recited will devised to his said brother *Arthur* was appointed to go. He then devised all his manors, lands, houses, tenements and estate in the county of *Meath*, and in the town of *New Ross* in the county of *Wexford*, to *Arthur* Lord *Altham*, for life; remainder to his eldest and other sons in tail male; remainder to the daughter and daughters of such son and sons, and to the daughters of the said Lord *Altham*, and the heirs of the body and bodies of all and every such daughter and daughters, share and share alike; remainder to his said brother *Arthur* for life; remainder to his eldest and other sons in tail male; remainder to the same persons, and with the same powers, as his other estate devised to him as aforesaid.

On the 9th of *December*, 1701, the testator executed another will; and thereby devised all his estate in *Ireland*, of which he had levied any fine, or suffered any recovery, or of which he was seised in fee and could dispose of, to the same trustees as were named in the former will, in trust for the payment of his debts; and



and then to his brother *Arthur* for life; remainder to his first and other sons in tail male; remainder to *Arthur Lord Altham*, his cousin, for life; remainder to his first and other sons in tail male; remainder to *Charles Annesley* his uncle, for life; remainder to his first and other sons in tail male; remainder to the testator's own right heirs.

And on the same 9th of *December*, the testator published a codicil; whereby, after reciting his first will, and his intention to provide for the payment of several legacies, and also for the more secure disposition of his real estate, some part of which he had suffered recoveries of since the said will; and after desiring that this codicil might be annexed to his said will, and taken as part thereof; he devised all his manors, lands, tenements and hereditaments whatsoever, in *England* or *Wales*, to trustees, subject to his debts, to the use of his brother *Arthur* for life; remainder to his eldest and other sons in tail male; remainder to such persons and with such powers, as the estates by his said recited will devised to his said brother *Arthur*, were appointed to go. He then bequeathed divers legacies to be paid out of his estates in the counties of *Kildare*, *Armagh* and *Tyrone*, in *Ireland*; and devised the same estates, or such part thereof as should remain unfold, to the use of his said brother *Arthur* for life; remainder to his sons in tail male; remainder to the same persons and with the same powers, as his said other estate devised to him as aforesaid was appointed. He then devised all his estate in the county of *Meath*, and in the town of *New Ross*, in the county of *Wexford*, to *Arthur Lord Altham*, for life; remainder in tail to his sons; remainder to the daughter and daughters of such son and sons, and to the daughters of the said *Arthur Lord Altham*; remainder to his said brother *Arthur* for life; remainder to his eldest and other sons in tail male; remainder to the same persons and with the same powers, as his said other estate devised to him as aforesaid was appointed to go.

On the 10th of the same month of *December*, the testator published two codicils; by the first, after reciting that he had published his *last* will, bearing date the 14th of *May* last; and also a codicil, bearing date the 23d of *November*, annexed; he thereby confirmed his said said will and codicil, and bequeathed  
some



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some pecuniary legacies to be paid out of his estate in *Essex*. And by the other codicil, after reciting the will bearing date the day before, and the codicil annexed thereto of the same date, *he confirmed both*; and bequeathed the same legacies to be paid out of his *Essex* estate, as in the first of these two codicils.

And on the 2d of *January* following, he published two other codicils; by both of which, after reciting generally, that he had by his last will devised certain lands, &c. to his brother *Arthur* for life, with divers remainders over; he thereby gave a power to his said brother, to settle a jointure on any wife or wives he should marry.

In *January*, 1701, Earl *James* died without issue male; on whose death both the said wills and the codicils thereto, were proved in the Ecclesiastical Court, and also in the Court of Chancery; and an act of Parliament passed for exemplifying the same under the Great Seal of *Great Britain*, and to make such exemplification evidence in all Courts of law and equity in *England* and *Ireland*; and the said wills and codicils were exemplified accordingly, so that the appellant was fully apprised of all his title and claim under the same.

*Arthur*, Earl of *Anglesey*, being seised in fee of the park of *Knockgrenan*, otherwise *Camolin* park, in the county of *Wexford*, in *Ireland*, built a large mansion house and offices, which cost him 5000*l.* at least; and being so seised, on the 18th of *February*, 1735, he made his will; and thereby devised the said park, house and keeper's lodge, and the woods growing in the park, to his cousin *Charles*, the respondent, and his heirs; and which woods were reputed to be worth 6000*l.* at least.

On the 1st of *April*, 1737, Earl *Arthur* died without issue; and upon his death the appellant found means to get possession of part of the said devised premises, and particularly of *Camolin* park, the house and keeper's lodge, and cut down some part of the woods, and threatened to cut down all the rest: Whereupon the respondent, in *Easter* term, 1737, exhibited a possessory bill in the Court of Chancery in *Ireland*, against the appellant; to be restored and quieted in the possession of the said devised estate, and that the appellant might be enjoined from cutting



cutting down the said woods: And upon moving the Court, and reading several affidavits, and a certificate of the bill filed; an order was made, that the appellant should shew cause why an injunction should not be granted; and that in the mean time, he should be restrained from cutting any of the woods; which order was served on the appellant, on the 30th of May, 1737.

Pending this suit, the appellant, being in *London*, often applied to, and requested *Francis Annesley*, Esq; (who was equally related both to the appellant and respondent) to use his kind endeavours towards bringing about an accommodation between them; and pressed Mr. *Annesley* to write directly to the respondent, who was then in *Dublin*, in order to prevail upon him to come to *London*, to adjust and settle the matters in difference; and voluntarily proposed, that the respondent should have and enjoy one third of both the *English* and *Irish* estates: Whereupon, Mr. *Annesley* was persuaded to write to the respondent, acquainting him with the appellant's proposal, and that the appellant desired the respondent would come to *London*, in order to settle the disputes that were depending.

On the respondent's coming to *London*, in *June*, 1737, a meeting was had between him and the appellant, at the house and in the presence of Mr. *Annesley*; who then told the appellant, that as there were disputes concerning the title to the estate, he would produce any deeds or papers that should be thought necessary relating to that title; and several other meetings were afterwards had, when the appellant rose in his demands, and insisted upon having the whole of the *English* estate, and that the respondent should have only one third of the *Irish* estate; and that the appellant should have a power to charge his two thirds of that estate with 25,000 *l.* which was 5000 *l.* more than he at first desired: Nothing therefore was concluded on at any of those meetings, but both parties took time to consider. And after many interviews between them and their relations and friends, they came into the following agreement.

By articles, dated the 16th of *June*, 1737, reciting, that divers disputes and controversies had been between the appellant and respondent, touching their respective rights and titles to



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the estates, lands, tenements and hereditaments, whereof the late *Arthur*, Earl of *Anglesey*, died seised or possessed, in the kingdoms of *Great Britain* and *Ireland*; it was witnessed, that for ending and accommodating all disputes and differences between them, any way relating to the premises; it was mutually agreed, that the respondent should release all the right and title which he had or claimed to all and every the estates, lands, tenements and hereditaments, whereof the said *Arthur*, late Earl of *Anglesey*, died seised or possessed in *Great Britain* or *Wales*, to the appellant and his heirs for ever; and for that purpose should do and execute all such further and other acts and deeds, as by the appellant's counsel should be advised or required. — That the appellant and respondent were to have all the wood and timber trees then growing upon any part of the said Earl *Arthur*'s estate, except the woods and timber trees standing and growing in the park of *Camolin*, to be divided equally between them, and disposed of as they should think fitting. — That the respondent should convey the park and lands, with the wood and timber trees standing and growing thereon, of *Knockengarrow*, alias *Knockgrenan*, near *Camolin*, in the county of *Wexford*, and the mansion house and keeper's lodge, with their and every of their appurtenances, to the appellant and his heirs for ever. In consideration of which, the respondent was to have, hold and enjoy part of the said Earl *Arthur*'s estate, of the clear yearly value of 200*l.* free from all incumbrances, to him and his heirs for ever; the same to be set out with all convenient speed. — That the appellant was to have two thirds of the remaining part of the said estate in *Ireland*, for life; remainder to his first and every other son in tail male; and for want of such issue, remainder to the respondent for life; remainder to his first and every other son in tail male; and for want of such issue, remainder to the right heirs of the appellant. And the respondent was to have the other third of the said estate for life; remainder to his first and every other son in tail male; and for want of such issue, remainder to the appellant, and his first and every other son in tail male, with the like remainders over to the right heirs of the respondent: And each of them was to have a power to make leases and settle jointures, in the manner therein mentioned; and likewise a power of charging by mortgage, or otherwise, on their respective shares, any sum not exceeding 25,000*l.* to the appellant, and 10,000*l.* to the respondent,



respondent; until such time as the said partition or division of the said estate could be made: And each of them was to have and receive a proportionable share of the rents, issues and profits, according to the allotment before mentioned, of the said whole estate and premisses in *Ireland*. — That the two thirds of the estate so belonging to the appellant, should be charged and chargeable with the payment of two thirds of an annuity of 2000*l.* payable to the Dutchess of *Buckingham* for her jointure; and also with the payment of two thirds of what should appear to remain due of the portion of Lady *Catherine*, daughter of *James* Earl of *Anglesey*, deceased, and of all other incumbrances affecting the estate of the late *James* and *Arthur* Earls of *Anglesey*; and that there should be a like proportionable charge on the third allotted to the respondent. — That the appellant agreed to waive all privilege of Parliament, as a Peer of *Great Britain* or *Ireland*, with respect to any suit or suits to be commenced or prosecuted, for any matter or thing to be claimed, sued for, or demanded, in consequence and pursuance of this agreement between him and the respondent. — And the appellant and respondent did mutually covenant and agree, each with the other, to execute all further acts and assurances, which by their counsel should be advised or required, at the request of either party, for the further conveying and assuring the premisses, according to the tenor and intent of the said agreement.

After the execution of these articles, the appellant entered into a treaty with Mr. *Francis Annesley*, for the sale of an undivided moiety of an estate in *Oxfordshire*; the other moiety whereof, was devised to Mr. *Annesley* himself, by Earl *Arthur*; and Mr. *Annesley* insisted, that unless the respondent joined in the conveyances, he would not purchase the same: Accordingly, in execution of these articles, the respondent joined in the fines, recoveries and conveyances, which were levied and suffered of this estate; and also levied fines and suffered recoveries of all other the estates in *England* and *Wales*, and executed proper deeds, declaring such fines and recoveries to be to the use of the appellant and his heirs; and at the same time many of the tenants, both in *England* and *Wales*, who had attorned to the respondent, did, at his request, attorn tenants to the appellant; by which the appellant obtained the quiet possession of the estate

in



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in *England* and *Wales*. And the respondent, in further performance of the articles on his part, caused several suits in replevin to be dropped, and also desisted from prosecuting the cause in equity; in consequence of which, the appellant soon after cut down part of the most valuable timber in the park of *Camolin*, to the value of 1500*l.* at least, which he could not have done had the respondent opposed it, as he was restrained by the order of the Court of Chancery before mentioned; but the respondent did not oppose his cutting down the timber, being willing in every thing to perform the articles on his part, and not doubting but the appellant would do the same when desired.

Thus the respondent did all that was to have been done on his part, and though the appellant had got all that was desired by him, yet he refused to perform the articles, and would neither execute deeds pursuant thereto, or suffer the respondent to receive any part of the rents of the estate.

Wherefore the respondent, on the 20th of *February*, 1737, exhibited his bill in the Court of Chancery in *Ireland*, against the appellant, to have the said articles specifically executed; but before the appellant put in his answer, many applications were made to the respondent, by persons employed by the appellant, to prevail on him to come to an accommodation with the appellant, rather than to be at the expence and trouble of a tedious law-suit; and by repeated solicitations, the respondent at length was prevailed on to meet the appellant, in order to try whether their disputes could be amicably determined: And accordingly, they had a meeting at a tavern in *Dublin*, on the 18th of *May*, 1738, with friends on both sides; at which meeting, several matters were talked of and proposed; but Mr. *Edmund Shanley*, the respondent's agent, declared that nothing was intended finally to be concluded, and hoped that nothing then said or done should be conclusive, for that the end and design of that meeting, was only to propose means for an accommodation; to which declaration, the appellant and his friends agreed; and it was understood on both sides, that nothing then said or done, should be in any sort binding on either party. It was however, after much conversation, proposed that three of the company should withdraw into another room, and consider of some



some terms which were to be the subject matter of future consideration; and they accordingly did so, and in a short time returned and brought in a paper in the words following: "*Charles Annesley, Esq;* is to have 1000*l. per ann.* in fee, clear of incumbrances; another 1000*l. per ann.* is to go to my Lord *Anglesey* for life; remainder to his first and every other son in tail male; remainder to *Charles Annesley* for life; remainder to his first and every other son in tail male; remainder to the right heirs of the Lord *Anglesey*; all the rest of the *Anglesey* estate to go to my Lord *Anglesey* in fee: And the article perfected in *England* to be cancelled, when deeds are perfected pursuant to this agreement, and fines and recoveries levied and suffered to establish those deeds. *May* the 18th, 1738."

— But this paper was not signed by either party.

When this proposal was brought in, the appellant seemed to be very angry that he was thereby to be made tenant for life only; and he arraigned the friendship of the persons who made the proposal, as containing terms too much in favour of the respondent; but at length he asked the respondent whether he would agree to it, and desired the respondent to sign the said writing; which the respondent expressly refused to do, intending to consult his friends, and further to consider of it before he made it conclusive: Upon which the appellant called for a Bible, and asked the respondent to swear that he would abide by the terms proposed, which the respondent also refused to do; notwithstanding which, *Cæsar Colclough* and *John Stratford*, two of the appellant's friends, thought proper to sign the said writing as witnesses; and the next day *Matthias Reilly*, one of the appellant's agents, went with Mr. *Shanley* to the several tenants of the *Dublin* estate, and persuaded them to sign an instrument, purporting to be an attornment: But as soon as the respondent came to the knowledge of what had been done, he directed Mr. *Shanley* to restore the possession to *Reilly*, which he instantly did; and in his presence delivered the money received by the tenants for their attornment, and cancelled the instrument so signed by them.

The last mentioned proposal or treaty for an accommodation being thus ended, the appellant, on the 15th of *August*, 1738, put in his answer; and thereby insisted, that the said articles of



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the 16th of *June*, 1737, were obtained and entered into by fraud, surprise and misrepresentation, when he was ignorant of his title; and that he and the respondent had come to a subsequent agreement, which was reduced into writing, and which he set forth in his answer, and declared he was willing to perform; and therefore insisted, that the first agreement was waived, and ought not to be carried into execution.

To this answer the respondent put in a special replication; stating, that the pretended second agreement was only a treaty for an accommodation, that it was not reduced into writing by his direction, or with his consent, and that it was not signed by either of the parties, and was therefore void.

On the 19th of *March*, 1738, the appellant exhibited his cross bill; alledging, as he had done in his answer to the respondent's bill, that the agreement of the 16th of *June*, 1737, was obtained by fraud, misrepresentation and surprise, and whilst he was ignorant of his title; and that the appellant had come to a second agreement, as before mentioned; and therefore prayed, that the first agreement might be set aside, and that the second might be established.

To this bill the respondent put in his answer, denying any fraud, surprise or misrepresentation; and insisted, that he was not bound by the second supposed agreement, for the reasons contained in his replication.

Both causes being at issue, witnesses were examined, and publication having passed, they came on to be heard before the Lord Chancellor of *Ireland*, on the 28th of *February*, 1740; when his Lordship was pleased to decree a specific execution of the articles, bearing date the 16th of *June*, 1737, so far as the same had not been already carried into execution; and that accordingly, the appellant should convey to the respondent and his heirs, lands of the clear yearly value of 200*l.* part of the estate which *Arthur*, late Earl of *Anglesey*, died seised or possessed of in *Ireland*, free from all incumbrances; and should account with the respondent, before the Master, for the said 200*l.* yearly, from the date of the said articles, upon which account all just allowances were to be made; and the respondent

was



was to convey to the appellant and his heirs, all his right and title to the park and lands, with the wood and timber trees standing and growing thereon, of *Knockengarrow*, otherwise *Knockgrenan*, near *Camolin*, in the county of *Wexford*, and the mansion house and keeper's lodge, with their appurtenances thereto belonging: And that a partition should be made between the appellant and respondent, of the residue of the estate whereof the said Earl *Arthur* died seised in *Ireland*, according to the said articles, viz. one third part thereof to the respondent, and the other two third parts to the appellant; and that a commission should issue to set out, according to quantity and quality, one third part of the said residue, to be conveyed to the respondent by the appellant, under the several limitations, remainders, powers, charges and incumbrances mentioned in the said articles; and the other two thirds of the residue of the said estate so set out, to be conveyed by the respondent to the appellant, under the several limitations, remainders, powers, charges, and incumbrances also mentioned in the said articles. And until such partition could be made, injunctions were awarded, to put the respondent into, and from time to time to quiet him in the peaceable possession of one third part of the said residue; and the appellant was to account with him before the Master, for one third part of the issues and profits of the said residue, from the date of the said articles; upon which account, all just allowances were to be made: And the respondent was declared to be entitled to cut down, fell and dispose of one half of the wood and timber trees which were standing and growing on the 16th of *June*, 1737, being the date of the said articles, upon any part of the said estate, whereof the said Earl *Arthur* died seised or possessed in *Ireland*, except the woods and timber trees in the said park of *Camolin* and of *Knockengarrow*, otherwise *Knockgrenan*; and if any of the said woods, exclusive of the said woods and timber trees in the said park of *Camolin* and of *Knockengarrow*, otherwise *Knockgrenan*, had been cut down by the appellant, or his orders, since the date of the said articles, he was to account with and pay to the respondent one moiety of the value of the woods so cut down: And in order to ascertain the same, the Master was to take an account of such woods so cut down, and the value thereof. And the appellant and respondent were directed to levy fines and suffer common recoveries



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recoveries of the estate, of which the said Earl *Arthur* died seised or possessed in *Ireland*, and to execute conveyances and assurances one to the other, according to the tenor and intent of the said articles; and the Master was to prepare and settle the same accordingly. The appellant's cross bill was ordered to be dismissed, and the consideration of the costs, as between him and the respondent, was reserved until the Master should have made his report.

D. Ryder.

W. Murray.

From this decree, the Earl thought proper to appeal; and on his behalf it was contended, that upon a plain construction of all the said wills and codicils, the respondent had no right, or even a colourable title, to any thing comprised in the articles of *June*, 1737, but that the title to all the premises appeared clearly to have been in the appellant; so that those articles being obtained without any real consideration, and being in their nature both unequal and unreasonable, a Court of Equity ought not to have decreed an agreement of that kind to be specifically performed. That these articles were founded in error, and a total ignorance of the appellant's title; he not knowing, that by the said wills and codicils he had a good title to the whole estate which passed by the will of Earl *James*; and that Earl *Arthur* was only tenant for life of the mansion house, lodge and park of *Camolin*, and could not dispose thereof by will. Besides, the appellant was drawn into this agreement, not only by a concealment of what ought to have been discovered to him, and taking an unfair advantage of his ignorance and credulity, but also by direct imposition and misrepresentation; and accordingly, the first agreement was absolutely waived and departed from by the second.

It is, however, objected on the part of the respondent, that the first agreement was, in part performed by him, by delivering possession of the *English* estate to the appellant, and joining with him in levying fines and suffering recoveries thereof; and that therefore, the appellant ought not to be excused from performing his part. — But to this it is answered, that the respondent had not the least colour of title to the possession of the *English* estate, which was taken by his friend Mr. *Annesley*, for his use; it not being so much as pretended, that the codicil of the 23<sup>d</sup> of *November*, which settled the *English* estate, was  
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 revoked



revoked by the will of the 9th of *December*, or otherwise; and as that was a tortious possession, it would be extremely unreasonable, that the yielding it up to the appellant, who had the right, should be deemed an adequate consideration for his giving up a third part of his estate. And, as to the respondent's joining with him in fines and recoveries, it served only to shew the appellant's ignorance of his title, in desiring that assistance from the respondent, which could not add to it, or be of any service to the appellant, who might have levied fines and suffered recoveries, without the respondent's concurrence, and even against his consent.

But it is further objected, that as no direct fraud was proved against the respondent, he ought not to be answerable for the confidence placed by the appellant in Mr. *Annesley*, or for any misrepresentations or concealments of his. — To this it is answered, that the circumstances of fraud, mentioned in the objection, are properly applicable to the respondent himself, who had better opportunities of learning the nature of his case, than the appellant had; he acted by good advice, the appellant did not; he at least took advantage of the appellant's ignorance and credulity, and endeavoured to profit by it; and which ought to have been a sufficient reason with a Court of Equity, not to have decreed a specific performance of so unequal an agreement.

It is also objected, that the second agreement was not intended to be obligatory; and if it had, was void by the statute of frauds and perjuries, because it was not subscribed by the parties. — But that this second agreement was really intended to be absolute and obligatory, appeared from an undoubted fact; viz. that it was partly carried into execution, by the delivery and acceptance of the possession of the *Dublin* estate, as part of the 1000 *l. per ann.* which was to be enjoyed by the respondent in pursuance of that agreement. The performance of an agreement, either in whole or in part, as to the terms whereof there is no uncertainty, has always been considered by Courts of Equity, as a circumstance to take it out of the statute of frauds, which was only intended to prevent the consequences of perjury, where agreements were uncertain; and therefore they have decreed in favour of parol agreements, when ascertained by the



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confession of the party in his answer; and when a parol agreement is in part performed, by the party contesting the same, and there is no doubt concerning the terms of it, as in the present case; such agreements are established and decreed for in Courts of Equity, if not unequal or unreasonable in themselves, or liable to some other objection than that of their not being signed by the parties. It was therefore hoped, that the decree would be reversed, the first agreement vacated, and the second established.

F. Chute.

T. Clarke.

On the part of the respondent it was insisted, that the agreement of *June*, 1737, was a very reasonable agreement, being made between two near relations of a noble family; the one having no issue, and the other being his first cousin and next heir male; who, in default of issue male of the appellant, must succeed to the honour and earldom, and who was clearly intended to succeed to the *Anglesey* estate; and that such agreement was the more reasonable, because it was made to quiet disputes and differences then subsisting, which were occasioned by the confusion that had been introduced by the two wills and six codicils, and to secure a convenient part of the estate to support the honours of the family; and therefore fit and proper to be carried into execution by a Court of Equity. That this agreement took its rise from a proposal originally made by the appellant, and was afterwards carried on by treaties between the common friends of both parties; till at last, upon full consideration, it ended in a manner more favourable for the appellant, than his own first proposal. And after due time had been taken for drawing and engrossing the articles, they were fairly and voluntarily executed by both parties, without the least ground for any imputation of fraud, surprise or imposition; the appellant having previously taken the advice of learned counsel concerning his title, and having had full opportunity of inspecting into it, if he had thought proper. That as this agreement had, in the several particulars abovementioned, been carried into execution on the part of the respondent, the circumstances of the estates were so far varied, that the respondent could not now be put into the same condition he was in before the agreement; and it would be very inequitable to let the appellant loose from his agreement, when so many acts had been done



done by the respondent in favour of the appellant, and to quiet his title to the estates he enjoyed under it; in which the respondent was no otherwise bound to assist or concur, than in compliance with the agreement. That the pretended second agreement could not vary the case, or amount to a waiver of the first, because it was never perfected according to the statute of frauds, nor properly carried into execution, nor could the appellant have compelled a specific performance of it; for altho' possession of part of the *Dublin* estate was delivered to the respondent's agent, without his consent, yet those premises were held only by chattel leases from the city of *Dublin*, and therefore, in their nature, could not be applied in performance of this pretended agreement: Besides, this possession, such as it was, as soon as the respondent knew of it, was restored; and the appellant had ever since been in the receipt of the rents and profits of the premises.. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

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AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.  
Jour. vol. 26.  
p. 72.

*Walter Cbetwynd, Esq;* - - Appellant. Case 53.

*Henry Fleetwood, Thomas Beckford,*  
*William Cbetwynd, William Clayton,*  
*Esqrs. Edward Lane, William Henry* } Respondents.  
*Cbetwynd, an Infant, and William*  
*Blacknell and Barbara his Wife,* }

17th May, 1742.

THE respondent *Henry Fleetwood* being seised in fee of the manors of *Howick, Farrington* and *Longton*, with the appurtenances, in the county of *Lancaster*, and several other messuages,



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messuages, lands, tithes and hereditaments in the same county, which were in the whole of the yearly value of 1300*l.* including fines payable on the renewal of leases; before his marriage in the year 1714, settled the same to the use of himself for life; remainder, as to part, for securing 400*l.* a year to his wife for her jointure, if she survived him; with remainder, as to other part, to trustees for a term of years, for raising 2000*l.* for portions of the younger children of the marriage; with remainder, as to the whole, subject to these charges, to the first and other sons of that marriage in tail; with remainder to the daughters of the marriage in tail; with remainder to the right heirs of the respondent for ever. But part of the premises were then in mortgage to *William Beckford*, Esq; for securing 5000*l.* and interest.

The respondent not having any issue by his wife, and there being no probability of any, and he being desirous of securing his estate to his niece, *Barbara Chetwynd*, the appellant's mother, and her issue; and having occasion for 1000*l.* and desiring to be made easy in his circumstances during his life, he, in *May*, 1725, came to an agreement with *Walter Chetwynd*, Esq; deceased, that the said *Walter Chetwynd* should pay Mr. *Beckford* 274*l.* 19*s.* due for interest of the said 5000*l.* to the 9th of *January* then last, and should pay the growing interest thereof, and indemnify the respondent against the payment of the same; and should besides, pay the respondent 1000*l.* to supply his occasions, (all which monies were, by the agreement, secured to be repaid in all events, with interest) and should, after the respondent's death, pay any sum not exceeding 5000*l.* to such persons and in such manner as the respondent should, by deed or will, direct; and that in consideration thereof, the respondent should settle and convey all his said manors, lands and premises, (charged and chargeable as aforesaid) to such uses, and in such manner, as after mentioned, for the benefit of the said *Walter Chetwynd* and his family.

In pursuance of this agreement, the respondent *Henry Fleetwood*, by indentures of lease and release, dated the 1st and 2d of *June*, 1725, did convey and assure to the respondent *William Chetwynd* and *John Wightwick*, deceased, and their heirs, all  
and



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and every the manors, messuages, advowsons, tithes, fisheries, lands, tenements and hereditaments therein particularly mentioned; and also all and singular other the manors, messuages, lands, tenements, tithes, burgages, rents, advowsons, reversions and hereditaments whatsoever, of him the said respondent *Henry*, situate and being in *Penwortham, Middleforth, Farrington, Howick, Longton, Haw, Hutton, Preston, Leyland, Ingball*, otherwise *Ingoll*, and *North-Meales*, or any of them, or elsewhere in the county of *Lancaster*, to the use of the respondent *Henry Fleetwood* for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder as to the manor of *Howick* and other the lands and premises within the parish of *Penwortham* (subject to the said rent-charge of 400*l.* per ann. to *Sarah*, the respondent *Fleetwood*'s wife, for her jointure, and subject to the two terms therein mentioned, for raising the 2000*l.* for the younger children, and subject to the estates tail limited to the issue of the respondent *Fleetwood* by the said *Sarah* his wife, as aforesaid) to the respondent *William Clayton* and *Bannister Parker*, since deceased, their executors, administrators and assigns, for the term of 500 years, to commence from the death of the respondent *Fleetwood*; in trust, within one year after the commencement of that term, out of the rents and profits of the premises, or by leasing or mortgaging the same, to raise any sum not exceeding 5000*l.* to be applied as the respondent *Fleetwood* should, by deed or will, appoint; and also to raise and pay to the respondent *Fleetwood*, his executors, administrators or assigns, all such sum and sums of money, as he or they should pay for or towards the 5000*l.* due to the said *William Beckford*, or any interest for the same, and for indemnifying the respondent *Fleetwood*, his executors and administrators, and his and their estates therefrom, and from all costs and charges occasioned by the non-payment thereof; and from and after the determination of the said term, and subject thereto, to the use of the said *Walter Chetwynd* and *Barbara* his wife, the appellant's father and mother, for their lives, and the life of the longer liver of them; remainder to trustees to preserve contingent remainders; remainder to the use of such son or sons, daughter or daughters of the said *Walter Chetwynd* and *Barbara* his wife, and to such issue of their bodies, and for such estates, determinable upon failure of issue,



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and with proper limitations to support contingent remainders, as the said *Walter Chetwynd* the father should, by deed or will, direct or appoint; and for want of such direction or appointment, to the use of the appellant for his life; remainder to trustees during his life, to support contingent remainders; remainder to the first and other sons of the appellant in tail male; remainder to *John Chetwynd*, since deceased, the second son of the said *Walter Chetwynd* and *Barbara* his wife, for his life; remainder to trustees to support the contingent remainders; remainder to the first and other sons of the said *John Chetwynd* in tail male; remainder to all and every other the sons of the said *Walter Chetwynd*, the father, by the said *Barbara* in tail male successively; remainder to the daughters of the said *Walter*, by the said *Barbara*, in tail; remainder to the right heirs of the respondent *Fleetwood*. And as to the residue of the said manors, lands and premises, whereof no use was before declared, the same was declared to be from and after the death of the respondent *Fleetwood*, to the use of the said *William Chetwynd* and *John Wightwick*, and their heirs, in trust to sell and dispose thereof, or of any part thereof, and thereby to raise money sufficient to pay and satisfy to the said *Walter Chetwynd*, his executors, administrators and assigns, as well the 1000*l.* advanced by him to the respondent *Fleetwood*, as also the 274*l.* 19*s.* by him then paid to the said *William Beckford*, with interest from the times of payment thereof; and also all such sums of money as the said *Walter Chetwynd*, his executors or administrators, should pay either for principal or interest of the 5000*l.* due to the said *William Beckford*, or which the said *Walter Chetwynd* should advance to the respondent *Fleetwood* in his life-time, with interest for the same from the times of payment thereof; and after satisfying the same, in trust to convey such of the said premises, as should remain unfold, to the use of the said *Walter Chetwynd* and *Barbara* his wife for their lives, with such remainders over as were before limited of the other parts of the estate. — And the said *Walter Chetwynd* thereby covenanted with the respondent *Fleetwood*, to pay to Mr. *Beckford* the said 5000*l.* and all interest for the same from the 9th of *January*, 1724, and to indemnify the respondent *Fleetwood* against the payment thereof. — And *Fleetwood* covenanted, that in case he should leave any issue by his said wife, his ex-  
cutors



cutors or administrators should, within one year after his death, repay to the said *Walter Chetwynd*, not only the said sums of 1000*l.* and 274*l.* 19*s.* already paid by the said *Walter Chetwynd*, with interest; but all such other sums as he, or his executors or administrators, should pay on account of the said 5000*l.* and interest, from the respective times of payment.

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By indenture, dated the 3d of the same *June*, the said *Walter Chetwynd* demised to the respondent *Fleetwood*, his executors, administrators and assigns, a messuage, farm and lands thereto belonging in *Grendon*, in the county of *Warwick*, for 99 years, for securing the payment of the said mortgage of 5000*l.* and interest, and indemnifying the respondent *Fleetwood* therefrom.

*Walter Chetwynd*, the father, paid the interest of the 5000*l.* to the 9th of *July*, 1731, but paid no part of the principal, and died intestate on the 5th of *February*, 1731, without having made any appointment, and did not leave any real or personal assets to make good his covenant; and *Barbara* his wife died on the 12th of *March* following. — There were issue of this marriage the appellant, the eldest son and heir, the respondents *William Henry Chetwynd* and *Barbara Blacknell*, all then infants, and no other issue; *John*, the second son, dying soon after the aforesaid settlement was made. And administration of *Walter*, the father, was granted to the respondent *Lane*.

*Walter Chetwynd* being dead, and not having left any assets, and all the children infants, and their guardian refusing to have any concern in the matters aforesaid, and the respondent *Fleetwood* being called upon for payment of the 5000*l.* and interest to the respondent *Beckford*, as the executor of the said *William Beckford*, and the estate at *Grendon* being incumbered to the full value, prior in time to the conveyance thereof made to the respondent *Fleetwood*, as aforesaid, and the said respondent being thereby brought into difficulties; he, on the 24th of *March*, 1732, exhibited his bill in the Court of Chancery, against the appellant and the respondents *William Henry Chetwynd*, *Barbara Blacknell*, then *Barbara Chetwynd*, *William Chetwynd*, *William Clayton*, *Thomas Beckford* and *Edward Lane*, and the said *John Wightwick* and *Bannister Parker*, since deceased; praying, that either the said 5000*l.* and the interest thereof, might



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might be paid out of the real and personal assets of the said *Walter Chetwynd*, deceased; or by the appellant, or out of his estate, and that the respondent *Fleetwood* might be indemnified against the same; and that in such case, the respondent *Beckford* might join with the respondent *Fleetwood* in an assignment of the said mortgage, for securing the monies which should be so advanced, in such manner as the Court should direct: Or otherwise, that on the respondent *Fleetwood*'s payment of the said 1000*l.* and 274*l.* 19*s.* and such other sums as the said *Walter Chetwynd* had paid for the interest of the said 5000*l.* with interest for the same from the respective times of payment thereof, and on the said respondent *Fleetwood*'s reconveying the said farm and lands at *Grendon*; that the said indentures of the 1st and 2d of *June*, 1725, might be delivered up, and the several estates therein contained sufficiently reconveyed to the respondent *Fleetwood*, or as he should direct.

To this bill the several defendants appeared and put in their answers; and the appellant and his brother and sister, then infants, by their answer said, they did not know whether it was for their benefit that the agreement made between the respondent *Fleetwood* and the said *Walter Chetwynd*, deceased, should be performed; or whether it was for their benefit that the said 5000*l.* and interest due to the respondent *Beckford*, should be paid out of the real estate of the appellant, or out of the rents thereof.

Issue being joined, and witnesses examined and publication passed, the cause came on to be heard on the 3d of *November*, 1735, before the Lord Chancellor *Talbot*; when it was ordered, that it should be referred to the Master to enquire whether it would be for the appellant's benefit, that what was due to the respondent *Beckford*, for principal and interest on his mortgage, should be paid out of the appellant's personal estate, in case the same was sufficient for that purpose; and that thereupon the mortgage should be assigned in trust for the appellant, but so as not to affect the estate for life of the respondent *Fleetwood*; and in case the appellant's personal estate should not be sufficient for that purpose, then the Master was to enquire whether it would be for the appellant's benefit, that the arrears and growing interest of the said mortgage, during the respondent *Fleetwood*'s life, should



should be paid out of the appellant's personal estate; and that what should be so advanced by him, should be charged on that part of the estate, which by the deeds of the 1st and 2d of June, 1725, was vested in trustees to be sold, after the respondent *Fleetwood's* death, to be repaid with interest from the time when the same should be so advanced; and the consideration of all further directions was reserved, till after the Master should have made his report.

In pursuance of this order the Master made his report, dated the 15th of November, 1736, and thereby stated the said indentures of the 1st, 2d, and 3d of June, 1725, and certified, that he did not find the said *Walter Chetwynd* left any personal assets to make good his covenant in the indenture of the 3d of June, 1725; and that the messuage and premises at *Grendon*, was subject to several incumbrances, whereby it was apprehended, that the said security would be of little or no value. That the respondent *Fleetwood* was then of about the age of 71, and *Sarah* his wife of about the age of 43; and that they had not any issue living, nor had any for upwards of 21 years past; and that the estates of the said respondent *Fleetwood* were 1180*l.* a year value, besides fines payable on the renewal of leases; and that the same were then worth to be sold upwards of 30,000*l.* and that the appellant was then about the age of 16 years, and was from the death of his father entitled to a real estate in possession, of the clear yearly value of 2640*l.* and upwards, subject to the raising of 8000*l.* for the portions of the respondents *William Henry Chetwynd* and *Barbara Blacknell*, and interest; and that there had been then already saved out of his said estate, about 3000*l.* then in the hands of the Accountant-general, besides a considerable sum in the hands of the receiver not accounted for; and as the respondent *Fleetwood* was so far advanced in years, and had not, nor was there any probability of his having issue; and that as whatever should be paid out of the appellant's estate for the said 5000*l.* and interest, would be secured to the appellant, with interest from the times of payment, by the assignment of the mortgage, and by the premises vested in the said *William Chetwynd* and *John Wightwick* in trust, to be sold, and would continue part of the appellant's personal estate; and that as the appellant's personal estate was not then sufficient to pay off the principal and interest



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of the said mortgage; the Master conceived it would be for the appellant's benefit, that the arrears and growing interest thereof should be paid out of the appellant's personal estate; and that it would be likewise for the appellant's benefit, to pay off both principal and interest on the said mortgage, so soon as the appellant's personal estate should be sufficient for that purpose.

On the 17th of *January*, 1736, the cause came on to be heard before Lord *Talbot*, on the Master's report; when his Lordship declared, that it was for the appellant's advantage, to carry the agreement between the respondent *Fleetwood* and the appellant's father into execution; and for that purpose ordered, that the appellant's personal estate then in the Bank, together with what money was then, or should thereafter come to the hands of the receiver, out of the rents and profits of the appellant's real estate, over and above what was or should be allowed for the appellant's maintenance, and all other just allowances, or so much thereof as should be sufficient, should be applied to the payment of the principal and interest due and to grow due on the respondent *Beckford's* mortgage, and of his costs, to be computed and taxed by the Master; and what should be so advanced on the appellant's behalf, was to stand charged on that part of the estate which by the settlement of the 2d of *June*, 1725, was limited to the said *Cbetwynd* and *Wightwick*, and their heirs, in trust that they should, after the death of the respondent *Fleetwood*, sell the same, and raise money sufficient to pay the said *Walter Cbetwynd*, deceased, the said 1000*l.* and 274*l.* 19*s.* therein mentioned; and such other sums as the said *Walter Cbetwynd* should pay, either for principal or interest, of the said 5000*l.* to the said *Thomas Beckford*, and for his costs, with interest for the same from the time of payment thereof, next after the sums advanced by the said *Walter Cbetwynd*, deceased, and the interest thereof; and the same was to be repaid thereout to the appellant, his executors and administrators, with interest from the times of the advancement thereof: And on payment of what should be found due for principal, interest and costs, to the said *Thomas Beckford*, he was to assign his mortgage to trustees, to be appointed by the Master, in trust for the appellant, as a further security for reimbursing to him the principal money which should be advanced, with interest for the same, from the respective times the same should be so advanced; but  
such



such mortgage, after the assignment thereof, was not to be made use of to affect the estate, during the life of the respondent *Fleetwood*.

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The original decree, together with the report and the order made on the further hearing, were duly signed and inrolled.

On the 20th of *February*, 1737, the Master made a further report; and thereby certified, that there was due to the respondent *Beckford* to the 10th of *April*, 1738, 6558*l.* 10*s.* 10*d.* for principal, interest and costs, on the said mortgage; which report was afterwards confirmed: And the Accountant-general having by his certificate, dated the 8th of *December*, 1739, certified at the request of the respondent *Beckford*, that there was then standing in his name in the *South-sea* Company's books, in the cause *Chetwynd* against *Chetwynd*, 5573*l.* 2*s.* 10*d.* *South-sea* annuities, and that there remained in cash 836*l.* 10*s.* 7*d.* Mr. *Beckford* presented a petition to the Lord Chancellor, praying that the said 5573*l.* 2*s.* 10*d.* *South-sea* annuities might be sold; and that the money arising by the sale thereof, together with the said 836*l.* 10*s.* 7*d.* remaining in the Bank, in the said cause, or so much thereof as should be sufficient for that purpose, might be paid to him towards discharge of the said 6558*l.* 10*s.* 10*d.* reported due to him on his mortgage, and of his subsequent interest and costs, to be taxed by the Master. And on the 20th of *December*, 1739, his Lordship ordered, that it should be referred back to the Master, to compute the subsequent interest due to the respondent *Beckford*, from the time the account was carried on in his last report, and tax him his subsequent costs; and that such subsequent interest and costs should be added to the sum reported due, and that the same should be paid out of the money arising by sale of the said *South-sea* annuities and money in the Bank; and to that end, that the 5573*l.* 2*s.* 10*d.* *South-sea* annuities should be sold, and the money arising by such sale, was to be applied in satisfaction of what should be found due to the respondent *Beckford*, for principal, interest and costs; and if that was not sufficient, then so much as should be wanting to make up what should be due for such principal, interest and costs, was to be paid to the respondent *Beckford*, by the receiver in the said cause *Chetwynd* against



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against *Cbetwynd*, out of the money that should be in his hands, over and above what was or should be allowed for the appellant's maintenance, and all other just allowances; and thereupon it was ordered, that the respondent *Beckford* should assign the said mortgage to trustees, to be appointed according to the order of the 17th of *January*, 1736; and procure all proper parties to join in such assignment.

On the 4th of *March*, 1740, the appellant attained his age of 21; and on the 4th of *November*, 1741, the Master made a further report, in pursuance of the order of the 20th *December*, 1739; and thereby certified, that there would be due to the respondent *Beckford* on his mortgage, on the 10th of *January*, 1741, 7689*l.* 1*s.* 3*d.*  $\frac{1}{4}$ .

The appellant, after attaining his age, made application to the Lord Chancellor *Hardwicke*, by petition, to rehear the cause. And on the 6th of *February*, 1741, the cause standing in the paper, was called on in order to be reheard; but it then appearing, that the original decree of the 30th of *November*, 1735, and the report of the 15th of *November*, 1736, and the order of the 17th of *January*, 1736, made on hearing the report, were signed and inrolled; his Lordship was pleased to order the petition for rehearing to be dismissed.

The report of the 4th of *November*, 1741, concerning what was due to Mr. *Beckford*, was confirmed unless cause, by an order of the 12th of *February*, 1741; and afterwards made absolute, on the 27th of the same month.

D. Ryder.  
J. Browne.

From this decree, and the subsequent reports and orders, the present appeal was brought; and for the appellant it was insisted, that he was neither executor or administrator to his father, and claimed no part of his personal estate, or any part of his real estate, except what was settled upon him by strict settlement; and in which his father had barely an estate for life, that determined on his death; and that therefore, the appellant was not bound to perform his father's covenants. And in case the Court should compel him to a specific performance of this agreement out of his own estate, without his consent, he would be in a worse condition, by being an infant at the time of the hearing, than he could have been if of full age; since it cannot



not be pretended, that the Court could have made such a decree against him had he been of age, without his own express consent to it. That should the appellant be obliged to pay the mortgage money, interest and costs, which now amounted to 7850*l.* or thereabouts, he could not be repaid any part of it, or any interest for his money, till after the death of the respondent *Fleetwood*, who, tho' very old, was healthy, and might live several years: The money advanced by the appellant's father, and now due to his administrator, with interest to this time, amounted to 4850*l.* and if the respondent *Fleetwood* was now dead, these two sums, with the 5000*l.* which he had a power to charge, making together 17,700*l.* must be raised by sale of part of the estate in question; and supposing the same to be worth 30,000*l.* according to the Master's report, what would remain of the estate, would be worth no more than 12,300*l.* in which, by the settlement, the appellant could have no greater estate than for life, chargeable with 400*l.* a year to the respondent *Fleetwood*'s wife, who was little more than 50 years of age, and very healthy: From all which calculations, it would evidently be of prejudice to the appellant, to carry this agreement into execution; and if the uses of the settlement had been truly represented to the Master, so that it had appeared upon his report, that the appellant was only tenant for life; it was apprehended, the Court would hardly have made such a decree, or declared it to be for the appellant's benefit to perform the agreement.

On the part of the respondent *Fleetwood*, it was said, that the agreement made with him by the appellant's father, was, at the time of its being first made, very greatly to the advantage of him and his family; since an estate of the yearly value of 1180*l.* besides fines on the renewal of leases, and worth above 30,000*l.* to be sold, was thereby settled upon the appellant's father and his issue, subject only to an estate for the life of the respondent *Fleetwood*, who was at that time above 60 years old, and to a jointure of 400*l.* a year which his wife would be entitled to in case she survived him, and only charged with debts to the amount of 6274*l.* 19*s.* and with 5000*l.* or so much of it, as the respondent *Fleetwood* should appoint to be raised out of the estate after his death. That at the time when this agreement was directed by the Court of Chancery to be carried

T. Clarke.

H. Legge.



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into execution, it was still more for the advantage of the appellant; for, as the respondent *Fleetwood* was at the time of the Master's report, 71 years of age, and without issue, or the probability of having any; there could be no reason to apprehend, but that the estate would soon come into possession, and greatly over-balance any money which might be advanced upon the credit of it. Nor would it make the agreement upon the whole, less reasonable in itself, or more advantageous for Mr. *Fleetwood*, that the appellant happened to be only tenant for life of the estate, since this was evidently intended for the purpose of preserving the estate longer in the appellant's family; and he being very young, would, according to the course of nature, probably enjoy this estate a great many years after Mr. *Fleetwood*'s death. Besides, the appellant's father had a power of limiting the inheritance of the estate to the appellant, if he had thought proper to exercise that power.

F. Chute.  
W. Murray.  
J. Taylor.

On behalf of the respondent *Beckford*, it was insisted, that as he had been kept out of his principal money, and without receiving any interest for near eleven years, solely upon the foot of an agreement made in the appellant's infancy, and ordered by the Court of Chancery to be carried into execution for his benefit; he ought to pay this respondent his principal, interest and costs, and stand in his place. That as between the appellant and Mr. *Beckford* the mortgagee, it was apprehended, that the direction of the Court of Chancery (after the proper and usual enquiry before a Master, whether the payment of the mortgage money and interest out of an infant's personal estate, would be for his interest, and a report that it is so) is so known a course, and so advantageous to infants in general, that mortgagees, relying on the authority of the Court in these cases, have at all times thought themselves secure, and been thereby prevailed on to forbear proceeding to foreclose, or using other methods to recover possession of the mortgaged estate; whereas, should such directions and decrees be rendered precarious, where no fraud is imputed, mortgagees would be induced to pursue legal methods, which must tend to the detriment of all minors interested in mortgaged estates. But by this intervention of the Court, such estates are preserved; and by assignment of the mortgage, the personal estate of the infant cannot receive any prejudice. It was therefore hoped, that the several orders and reports ap-  
pealed



pealed from would, at least so far as they concerned the respondent *Beckford*, be affirmed; and that the appeal, as against him, would be dismissed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree, orders and reports therein complained of, affirmed: And it was further ORDERED, that there should be paid to the respondent *Beckford*, the sum of 30 *l.* for his costs in respect of the appeal; and that the same should be added to the principal, interest and costs, decreed by the Court of Chancery to be paid to him.

DECREE  
affirmed.  
Jour. vol. 26.  
P. 122.

*Bretridge Badham*, Esq; - - Appellant. Case 54.

*Thomas Odell*, an Infant, and the Honourable *James Fitz-Maurice*, Esq; } Respondents.  
his Guardian, - -

22d June, 1742.

**A**NDREW *Brandon*, by indentures of lease and release, dated the 20th and 21st of September, 1671, in consideration of 1000 *l.* sterling, paid him by *John Odell*, Esq; and of the further sum of 950 *l.* 16 *s.* sterling to be paid him by eight half-yearly payments, sold and conveyed to the said *John Odell*, all those his messuages and lands with the appurtenances, therein particularly described, containing in the whole 2506 acres, plantation-measure, being part of *Brandon's Lot*, situate in the barony of *Conolloe* and county of *Limerick*; to hold to the said *John Odell*, his heirs and assigns for ever. And *Odell*, for better securing the 950 *l.* and interest, made a mortgage of the premises to *Brandon* for 1000 years, by indenture, dated the 22d of the same month; redeemable on payment of the money, with interest after the rate of 10 *l.* per cent. by the several instalments in the release mentioned.

Default being made in payment of the said several sums of money, by indenture of assignment, dated the 1st of April, 1681,



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1681, the said *Andrew Brandon*, for the consideration therein mentioned, assigned the said mortgage and the benefit thereof, to Sir *Mathew Deane*, Bart. who continued to receive the interest, and also received so much of the principal, as reduced the money remaining due on the mortgage to 750*l.*; and on the death of the said Sir *Matthew Deane*, Sir *Matthew Deane* the younger, his grandson, heir and executor, became entitled to the principal and interest then due.

By indenture dated the 1st of *May*, 1714, made between the said Sir *Matthew Deane* the younger and the appellant, Sir *Matthew*, in consideration of 750*l.* assigned the said mortgage, and all monies due thereon, to the appellant.

Upon the death of *John Odell* the mortgagor, the equity of redemption of the mortgaged premises descended to *John Odell*, his son and heir; and on his death, the said equity of redemption descended to *John Odell* the younger, his eldest son and heir, who, for several years after his father's death, continued to pay Sir *Matthew Deane* and the appellant 75*l.* a year, for the interest of the said sum of 750*l.* sterling, remaining due on the mortgage.

In *Trinity* term, 1719, the last named *John Odell* exhibited his bill in the Court of Exchequer in *Ireland*, against the appellant and Sir *Matthew Deane*, to redeem the premises, and for an account of the money due on the mortgage; and he thereby declared himself ready to pay what should on such account appear to be due, and prayed that the appellant might be decreed to receive the same, and to assign the mortgage to him, or as he should appoint.

The appellant, in *June*, 1720, put in an answer to this bill; and thereby submitted to a redemption, upon payment of what was justly due on the mortgage: And Sir *Matthew Deane* also put in his answer, and confessed the assignment to the appellant, and that at the time of the making thereof, there remained due 750*l.* of the principal mortgage money.

There being on the 1st of *May*, 1721, an arrear of 200*l.* sterling due for interest, and the appellant calling on the said *John Odell*, the respondent's father, for payment thereof; he  
with



with the privity of the respondent *Fitz-Maurice*, who was his father in law, proposed to make the same principal, by executing a bond to the appellant for the payment of that sum with legal interest; and the appellant having agreed to advance a sum of 18*l.* 10*s.* for the said *John Odell*, he, on the 1st of *August*, 1721, executed a bond to the appellant, conditioned for his payment of the said sum of 218*l.* 10*s.* with interest.

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This money and interest not being paid, and there being a further arrear of interest incurred on the mortgage, the said *John Odell*, on the 5th of *August*, 1723, filed an amended and supplemental bill against the appellant; and therein charged, that on his giving the said bond for 218*l.* 10*s.* the appellant gave him an instrument, acknowledging, that the bond was perfected for security of so much interest money then due on the mortgage; and further charged, that at the appellant's request, he procured one *Richard Bury*, Esq; to agree to lend him 1200*l.* at 6*l.* *per cent.* interest, on the security of the said mortgage being assigned to him, and that the said 1200*l.* had been carried in a bag some time in *Hilary* term, 1722, and tendered to the appellant, and that he refused to receive the same, or assign his said mortgage. And therefore this amended and supplemental bill prayed, that the appellant might come to a fair account with *Odell*, and that upon payment of the remaining principal, and the legal interest thereof, from the time of the assignment to him to the time of the said tender, he might be decreed to assign over his said mortgage to the said *Richard Bury*, or such other person as the plaintiff should direct; and might be decreed to deliver up the said bond, dated the 1st of *August*, 1721, to be cancelled; and that the appellant might be stayed by injunction, from proceeding at law against the said *John Odell*, in relation to the premises.

The appellant, by his answer to this bill, insisted that he had received no interest on the mortgage since the 200*l.* included in the said bond for 218*l.* 10*s.* and on the 28th of *May*, 1724, the appellant filed his bill in the said Court of Exchequer, against the said *John Odell* and the respondent *Fitz-Maurice*, for a discovery; and for an account and foreclosure of the equity of redemption of the mortgage, unless *Odell* paid what should appear due thereon to the appellant.



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The said *John Odell* put in his answer to this bill; and among other things insisted, that there was no other or greater sum due to the appellant on the mortgage, than 750*l.* principal, and the interest thereof, from the time of his giving the said bond, to the time of the pretended tender; and submitted to account with the appellant, and to pay him what was justly due; but insisted, that the appellant ought to be decreed only 8*l. per cent.* interest on the principal sum of 750*l.* that being the rate of interest of money at the time the mortgage was assigned to the appellant, and that he should assign his mortgage, on being paid what was or should be due to him.

*Odell* afterwards put in a further answer, and in *December*, 1735, before any further proceedings were had in either of the causes, he died; leaving the respondent *Thomas Odell*, his eldest son and heir, an infant; who, on the 25th of *June*, 1726, filed his bill of revivor against the appellant; and soon afterwards, the appellant duly revived his suit against the said respondent.

On the 20th of *June*, 1729, the original cause was heard; when the Court decreed, that it should be referred to the Chief Remembrancer, or his Deputy, to state and settle an account of what was due to the appellant of the 750*l.* principal money, mentioned in the assignment to him from the defendant Sir *Matthew Deane*, and for the interest thereof, from the time of the said assignment, at the rate of 10*l. per cent. per ann.* and costs; and the respondent *Odell* was to have credit out of the interest of the said mortgage money, for the 200*l.* bond in the pleadings mentioned, and was to be charged with the said bond, and such interest as was therein mentioned; and if no interest was mentioned therein, then with legal interest, and both parties were to have just allowances: And it was further ordered, that the respondent *Odell* should, within six months after the report should be made and confirmed, pay to the appellant what should appear, by such report, to be due to him, or that the said bill should be dismissed.

On the 12th of *March*, 1730, the Deputy Remembrancer made his report; whereby he certified, that there was due to the appellant, on the foot of the said mortgage, and the assignment thereof, dated the 1st of *May*, 1714, the sum of 1883*l.*  
18*s.*



18s. 4d. And there being no objections or exceptions taken to this report, the same was, on the 6th of *July*, 1731, absolutely confirmed. And on the 13th of the same month, the cause came on to be further heard on the matter of the said report; when it was decreed, that upon the respondent's paying to the appellant the said sum of 1883*l.* 18s. 4d. so reported due, with interest for the same from the said 6th of *July*, 1731, being the time of confirming the report, as also his costs of the said suit; the appellant should reconvey to the respondent the said mortgaged premisses, freed from all incumbrances, and should also deliver up to him all bonds and securities entered into for the said debt; or any part thereof; and in case any judgment or judgments were entered up on the said bonds, or any of them, that the appellant should acknowledge satisfaction on the record of such judgment, at the respondent's expence.

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The respondent neglecting to pay the money so reported due, or any interest for the same; the appellant, in order to have the benefit of the said decree, by a sale or absolute foreclosure of the mortgaged premisses, filed his amended and supplemental bill against the respondents; stating the decrees, report and proceedings in the former cause, and that no part of the 1883*l.* 18s. 4d. or any interest for the same had been paid; and that in regard the mortgaged premisses were not, by either of the said decrees, directed to be sold, the respondent *Odell* and his guardian had neglected to raise or pay the said 1883*l.* 18s. 4d. or the interest thereof; and that the appellant could not, by the course of proceedings in *Ireland*, enforce the payment thereof, but by bringing such his amended and supplemental bill for a sale or foreclosure of the mortgaged lands: And in regard the account of what was due on the said mortgage, had been stated in the former cause, the appellant prayed to have the benefit thereof, and of all the other proceedings in that cause; and that the account to be taken in his present suit, might be taken on the foot of the report, or decree made in the said former suit.

The respondents put in their joint answers to this amended and supplemental bill, and thereby admitted the said report, decrees and proceedings; but insisted, that the respondent *Odell*, apprehending that he was much aggrieved by the said decrees and



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and report, chose to have his bill, upon which the said decrees were made, dismissed, rather than submit thereto; and they admitted, that no part of the money, so reported to be due, had been paid to the appellant.

The appellant replied to this answer, and the respondent rejoined, but no witnesses were examined on either side: And the cause came on to be heard on the pleadings, and on the proofs taken in the former cause, in which *Odell* was plaintiff, on the 6th of *December*, and 27th of *February*, 1737, and on the 20th of *February*, 1738, when the Court declared they were of opinion, that the defendant *Odell*, the minor, was not to be concluded by the account taken in the said former cause, but that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the Chief Remembrancer, or his Deputy, to audit and state an account between the plaintiff and defendant, on the foot of the mortgage and securities in the pleadings mentioned, in which account both parties were to have all just allowances; and if any thing should appear difficult to the Remembrancer, in stating of the said accounts, he was desired to report the same specially; when such order should be made as should be just.

D. Ryder.  
C. Clarke.

From this decree the appellant appealed; insisting, that the respondent *Odell* ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived and carried on by himself, confirmed by subsequent orders of the Court, and both the decrees signed and inrolled; and that he ought not now to be permitted to waive or vary the same, especially when neither fraud or error in the account was even suggested. That the Court ought to have directed an account to be taken of what was due to the appellant, in respect of the said sum of 1883*l.* 18*s.* 4*d.* reported due to him, together with interest for the same from the 6th of *July*, 1731, when that report was confirmed; and in case of the respondent *Odell*'s not paying the same by a time to have been limited, the Court ought to have decreed him to stand absolutely foreclosed; or at least to have decreed a sale of the mortgaged premises, or so much thereof as should be necessary for raising and discharging what remained due to the appellant for principal



principal and interest on his mortgage, and for his costs of this and the former suits. As to the objection, that the respondent *Odell* was an infant, at the time of pronouncing the two former decrees, and of making the report, and that therefore he is not bound or concluded by them; it was answered, that the account and report in question, having been taken and made in a cause, wherein the respondent *Odell* was plaintiff, nothing is more certain or established, than that he, tho' then a minor, is bound and concluded thereby; and more especially in a case, where he has not attempted to shew any fraud or error to his prejudice. Besides, by not having paid the money reported due, within six months after confirming the report, he thereby, in strictness, waived and forfeited all benefit of the equity of redemption.

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On the other side it was argued, that by the terms of the decree, the respondent was at liberty, if he thought fit, to suffer his bill to be dismissed with costs; and that such dismissal did not entitle the appellant to an absolute decree for a foreclosure or sale, but the equity of redemption was still kept open by the appellant's own bill, upon which he was entitled to the common alternative decree, either that the respondent should redeem, or stand absolutely foreclosed. That as the respondent was entitled to a redemption, so by the ordinary justice of the Court, he was entitled to it on payment only of what was really due; nor ought he (being still an infant) to be precluded from this right, by the proceedings on a bill originally indeed filed by his father, but revived, carried on and dismissed during his infancy, and whilst he was utterly incapable of taking care of his own interest. That as these proceedings were now out of Court by the dismissal of the bill, so they ought never to be introduced, and much less made the ground of a decree in the present cause; for if the infant was to be concluded by the account already taken, and to pay the balance, with interest, from the date of the report, or be foreclosed; he would then be for ever prevented from disputing any errors, omissions or overcharges in the account, and must either lose his estate, or submit to pay the balance of an account, compounded partly of principal, but chiefly of interest, and worked up to a much greater sum than was really due, carrying interest from the date of the report, which was an

J. Browne.  
W. Murray.



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hardship and injustice that a Court of Equity would never inflict upon an infant. That if the appellant should prevail in this attempt, it would be a dangerous precedent to infants in general, whose estates were under mortgage; for if they were to be foreclosed of their estate, by the dismissal of a bill brought for a redemption, or to be bound by an account taken during their minority, they would be in danger of being ruined by the injustice, neglect or misconduct of their guardians; whereas on the other hand, the appellant could never suffer the least injury from the decree, as it now stood; for he must necessarily be paid what is really due for principal, interest and costs, which is all that in conscience he ought to demand, or the Court in justice ought to allow him. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE  
reversed.  
Jour. vol. 26.  
P. 149.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed: And it was further ORDERED, that the account taken under the decree of the 20th of *June*, 1729, should stand, with liberty for the respondent *Odell* to surcharge or falsify the same; and that in case any surcharge or falsification should be made to appear, the Remembrancer of the Court of Exchequer should deduct so much as ought to be deducted, on account of such surcharge or falsification: And that the said Remembrancer should carry on the account of the subsequent interest, at the rate of 6 *l. per cent. per ann.* from the time of the confirmation of the report of the 12th of *March*, 1730, for the sum thereby reported due to the appellant, after such deductions made thereout as aforesaid; and that in taking the said account, the said Remembrancer should make to all parties all just allowances; and that all parties should be examined upon interrogatories, and produce all deeds and writings, books and papers of account relating to the premises in question, as the Remembrancer should direct; and that the consideration of the costs of this suit, and of all further directions, should be reserved until after the said Remembrancer should have made his report; and if any thing should appear difficult to him, he was to report the same specially to the Court; and after making the said report, such further order should be made as should be just.

Richard



Richard Tucker, Esq; Plaintiff }  
Our Sovereign Lord the } in Error.  
King, — } Defendant }

Cafe 55.

1st December, 1742.

IN Hilary term, 1740, an information, in nature of a *quo warranto*, was granted by the Court of *King's Bench* against Richard Tucker, of the borough and town of *Weymouth* and *Melcombe Regis* in the county of *Dorset*, Esq; to shew by what authority he claimed to be Mayor of the said borough and town.

To this information Tucker pleaded, that King James I. by his letters patent, bearing date the 1st day of July in the 14th year of his reign, granted that the Mayor, Aldermen, Bailiffs, Burgeses and Commonalty of the borough and town of *Weymouth* and *Melcombe Regis* in the county of *Dorset*, should be a body politic and corporate, by the name of Mayor, Aldermen, Bailiffs, Burgeses and Commonalty of the borough and town of *Weymouth* and *Melcombe Regis* in the county of *Dorset*: And that from thenceforth, for ever, there should be within the borough and town aforesaid, one of the burgeses or inhabitants of the same town, who should be, and should be called Mayor; and also that there should be divers men of the borough and town aforesaid, who should be Aldermen; and in the like manner, there should be two other men of the borough and town aforesaid, who should be called Bailiffs, and that there should be twenty-four other men, who should be capital and principal Burgeses of the said borough and town: And the said King, by his said charter, appointed a Mayor, eleven Aldermen, two Bailiffs and twenty-four capital and principal Burgeses, naming them particularly. The charter further granted to the Mayor, Aldermen, Bailiffs, Burgeses and Commonalty of the said borough and town, and their successors, that the Mayor and Aldermen for the time being, or the major part of them, being assembled in the Guildhall, or in some other convenient place within the said borough and town, should,

on



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on the feast of *St. Matthew* the Apostle yearly, choose and name four of the Burgeſſes or inhabitants of the borough and town aforeſaid, out of which four, ſo to be named and choſen, the Mayor, Aldermen, Bailiffs, principal Burgeſſes and other Burgeſſes and inhabitants of the borough and town aforeſaid for the time being, on the ſame day there aſſembled for that purpoſe, ſhould, by the majority of voices of them ſo aſſembled, elect one to be Mayor of the ſaid borough and town; and that he, after ſuch election, ſhould, before he ſhould be admitted to exerciſe that office, take an oath before the laſt Mayor, his predeceſſor, or the Recorder, in the preſence of ſo many of the Aldermen, Bailiffs and principal Burgeſſes, as would be preſent, for the due execution of his office; and that after ſuch oath ſo taken, he ſhould execute that office for one whole year, and from thence until another ſhould be duly elected, and ſworn according to the directions of the ſaid charter. — The plea then ſtated, that thoſe letters patent were accepted by the Mayor, Aldermen, Bailiffs, Burgeſſes and Commonalty of the ſaid borough and town: And that on the feaſt of *St. Matthew*, 1740, the then Mayor and Aldermen of the ſaid borough and town met together at the Guildhall, in order to name four of the Burgeſſes or inhabitants of the ſaid borough and town, out of which the then Mayor, Aldermen, Bailiffs, principal Burgeſſes, and other Burgeſſes and inhabitants (being on the ſame day there alſo met for that purpoſe) might, by the majority of voices of thoſe ſo met, elect one of them to be Mayor; and that the major part of them, the ſaid then Mayor and Aldermen being then and there met as aforeſaid, for the purpoſe aforeſaid, did then and there name *John Tucker*, Eſq; the ſaid *Richard Tucker*, *John Friend* and *John Carſewell*, then being four of the inhabitants of the borough and town aforeſaid, in order that out of them ſo named, the then Mayor, Aldermen, Bailiffs, principal Burgeſſes and other Burgeſſes and inhabitants (being alſo on the ſame day there met for the purpoſe aforeſaid) might elect one to be Mayor. And that at an aſſembly of the then Mayor, Aldermen, Bailiffs, principal Burgeſſes, and other Burgeſſes and inhabitants of the ſaid borough and town, held on the ſame day at the Guildhall (they being met together for that purpoſe) they the ſaid *John Tucker*, *Richard Tucker*, *John Friend* and *John Carſewell*, were then and there duly declared to the ſaid then Mayor, Aldermen, Bailiffs, principal Burgeſſes, and other



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other Burgeſſes and inhabitants of the ſaid borough and town ſo aſſembled as aforeſaid, in order that out of them ſo named, the ſaid then Mayor, Aldermen, Bailiffs, principal Burgeſſes and other Burgeſſes and inhabitants, might, by the majority of voices of them ſo met, elect one to be Mayor; and that at the ſaid aſſembly, he the ſaid *Richard Tucker* was then and there elected to be Mayor of the ſaid borough and town, by the majority of voices of them ſo aſſembled; and that after ſuch election, and before he was admitted to exerciſe the ſaid office, to wit, on the 6th day of *October*, in the year aforeſaid, he took his oath for the due execution thereof, before *Richard Jordan* the then laſt Mayor, his predeceſſor, in the preſence of as many of the Aldermen, Bailiffs and principal Burgeſſes, as would be preſent; and by virtue thereof, on the ſaid 6th day of *October*, was admitted into the ſaid office of Mayor, and took upon himſelf the execution thereof; and by that warrant he claimed to be Mayor.

To this plea the Coroner and Attorney replied, and thereby admitted the letters patent mentioned in the plea; and then ſet forth, that the ſaid King *James*, by his letters patent, willed, that the Mayor, Aldermen, Bailiffs and principal Burgeſſes of the ſaid borough and town for the time being, or the major part of them, ſhould, on *St. Matthew's* day yearly, elect two of the Burgeſſes or inhabitants of the ſaid borough and town to be Bailiffs, who ſhould take the oaths of office, and ſhould exerciſe thoſe offices for one whole year; and from thence until two others ſhould be duly elected thereto, according to the directions of the ſaid charter. And that if the Mayor ſhould die or be removed from his office within the year, the Aldermen, Bailiffs, principal Burgeſſes and other Burgeſſes and inhabitants for the time being, or the major part of them, ſhould elect another of the Burgeſſes or inhabitants to be Mayor, who ſhould exerciſe the office for the reſidue of the year, and until another ſhould be duly elected thereto, according to the directions of the ſaid charter, having firſt taken an oath for the due execution of his office. That if any of the Aldermen ſhould die, or be removed or depart from that office, and at the time of the death, amotion or departure of ſuch Alderman, there ſhould not be eight Aldermen ſurviving, that the Mayor and ſurviving Aldermen, as alſo the Bailiffs and principal Burgeſſes



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gesses for the time being, or the major part of them, should elect so many as should be wanting of that number, out of the Burgeses or inhabitants, to be an Alderman or Aldermen of the said borough and town; and that he and they so elected, having first taken an oath faithfully to execute the said office, should exercise the same during his or their natural life or lives, unless in the mean time removed, according to the directions of the said letters patent. — And the said King further willed, that every person who, at any time thereafter, should exercise the said office of Mayor, if not amoved for misbehaviour, should, immediately after the expiration of the same, become an Alderman, to continue in the same for life, if he should so long behave himself well in the same. — That if the Bailiffs, or either of them, should die or be removed from that office within the year, the Mayor, Aldermen, Bailiffs and principal Burgeses, and other Burgeses and inhabitants of the said borough and town for the time being, or the major part of them, should elect one other or two others out of the Burgeses or inhabitants to be Bailiff or Bailiffs. — That if any or either of the twenty-four capital or principal Burgeses should die, be removed or depart from that office, that the Mayor, Aldermen, Bailiffs, and the rest of the principal Burgeses for the time being, or the major part of them, should elect one or more others out of the Burgeses or inhabitants of the said borough and town, into the place or places of such principal Burges or Burgeses so happening to die or to be removed.

The replication further set forth, that ever since granting the said letters patent, the usage had been within the said borough and town, that upon the day appointed for the election of Mayor, in case the number of Aldermen then in being was, at that time less than eight, the then Mayor and surviving Aldermen, as also the then Bailiffs and capital and principal Burgeses, or the major part of them, being met together in the Guildhall for that purpose, always proceeded to elect so many as were then wanting of that number, out of the Burgeses or inhabitants of the said borough and town, to be an Alderman or Aldermen, before the said then Mayor, Aldermen, Bailiffs, principal Burgeses and other Burgeses and inhabitants, proceeded to the election of a Mayor for the year then next ensuing. — That on St. Matthew's day, 1740, being the day on which



which the said *Richard Tucker* was supposed, by his plea, to have been so nominated, elected and preferred to be Mayor, as aforesaid; the number of Aldermen then surviving and remaining, exclusive of the said *Richard Jordan*, who then pretended to act as Mayor, was less than eight (that is to say) *John Carswell*, *John Friend*, *John Tucker*, *Richard Tucker* and *Edward Tizard*; and that the said *Richard Jordan* and the said Aldermen, upon *St. Matthew's day* aforesaid, did not proceed to elect so many, as was then wanting of the said number of eight Aldermen, out of the Burgeses or inhabitants of the said borough and town. — The replication then admitted, that the defendant *Richard Tucker*, and also the said *John Tucker*, *John Friend* and *John Carswell*, were all of them inhabitants of the borough and town aforesaid, at the time when they were supposed, by the said plea, to have been nominated as aforesaid; yet it alledged, that they and every one of them were also, at that time, Aldermen of the said borough and town.

Then the following matters set out in the plea were traversed; viz.—I. That the Mayor and Aldermen did not assemble for the purpose mentioned in the plea, as thereby was alledged; and thereupon an issue was joined.—II. That the major part of the Mayor and Aldermen did not choose and name the said *John Tucker*, *Richard Tucker*, *John Friend* and *John Carswell*, for the purpose in the plea mentioned; and thereupon a second issue was joined.—III. That the said *John Tucker*, *Richard Tucker*, *John Friend* and *John Carswell*, were not declared to the Mayor, Aldermen, Bailiffs, principal Burgeses, and other Burgeses and inhabitants of the borough and town aforesaid, for the purpose in the said plea mentioned; and thereupon a third issue was joined.—IV. That the said *Richard Tucker* was not elected to be Mayor of the borough and town aforesaid, as he had by his plea alledged; and thereupon a fourth issue was joined.—V. That the said *Richard Tucker* did not take his corporal oath for the due execution of the said office, as he by his said plea alledged; and thereupon a fifth issue was joined.—VI. That *Richard Jordan* was not Mayor of the said borough and town, as the said *Richard Tucker* by his plea alledged; and thereupon a sixth issue was joined.—VII. That he, the said *Richard Tucker*, was not admitted into the said office of Mayor, as he had by his said plea alledged; and thereupon a seventh issue was joined.



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To this replication *Tucker* rejoined, and thereby denied the custom of filling up the number of Aldermen before the election of Mayor, as set out in the replication; and insisted, that on the said feast of *St. Matthew* the Apostle, being the day appointed by the said letters patent, for the election of a Mayor; and at the time of the nomination and election of the said *Richard Tucker* to be Mayor, there were eight Aldermen then surviving and remaining; and thereupon the eighth issue was joined.

By this rejoinder it was admitted, that the said *Richard Tucker*, *John Tucker*, *John Friend* and *John Garfellow*, were Aldermen, as alledged in the replication; and likewise, that the King did, by his said letters patent, further grant to the Mayor, Aldermen, Bailiffs, Burgeses and Commonalty of the said borough and town, in manner as set out in the said replication; but the said *Richard Tucker* alledged, that the said King did by his said letters patent, further will and grant, that the Mayor, Aldermen, Bailiffs and principal or capital Burgeses of the borough and town aforesaid, for the time being, or the major part of them (of whom the Mayor to be one) upon public summons to be made by the Mayor, should assemble in the Guildhall, to make bye-laws for the good rule and government of the said borough and town, and of all Officers and Ministers whatsoever within the same: And that after the making and acceptance of the said letters patent, viz. on the 1st day of *September*, in the 14th year of the reign of the said King *James I.* the then Mayor, Aldermen, Bailiffs and principal or capital Burgeses, upon public summons by the Mayor, assembled together and there made a certain ordinance in writing, called a bye-law, (although the same was not now extant in writing) that from thenceforth for ever, the Mayor and Aldermen of the said borough and town for the time being, or the major part of them, from time to time, in all future times, being met together and assembled in the Guildhall of the said borough and town, or in any other convenient place within the said borough and town, for the nomination of a Mayor of the said borough and town, might and should be at liberty whenever and as often as it should seem meet and convenient to them, to choose and name four of the *Burgeses* or *inhabitants* of the said borough and town who should be then all of them Aldermen of the said borough



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borough and town, or whereof any one or more should be then Alderman or Aldermen of the same borough and town, and the other or rest of them not Alderman or Aldermen of the said borough and town, in order that out of the said four so to be named and chosen, the Mayor, Aldermen, Bailiffs, principal Burgeffes, and other Burgeffes and inhabitants of the borough and town aforefaid, for the time being, (being also there on the same day met together and assembled for that purpose) might by the majority of voices of them so met together, elect and prefer one to be Mayor of the borough and town aforefaid; and that the said Mayor, Aldermen, Bailiffs, principal Burgeffes, and other Burgeffes and inhabitants of the said borough and town for the time being, should elect and prefer one of those four so to be named, to be Mayor of the said borough and town for the year then next ensuing. Which said bye-law the then Mayor, Aldermen, Bailiffs, principal or capital Burgeffes, and other Burgeffes and inhabitants of the said borough and town, on the said 1st day of *September*, in the 14th year of the said King *James I.* accepted and assented thereunto, and had ever since conformed themselves thereto. — And then set forth an usage agreeable to the said bye-law.

To this bye-law the said Coroner and Attorney demurred. — And the said *Richard Tucker* joined in demurrer.

The several issues above joined, were tried at the Assizes holden at *Dorchester*, on the 12th of *March*, 1740; when a verdict was found for *Tucker* upon every one of them.

The demurrer was argued in *Easter* term, 1741; when the Court were unanimously of opinion, that the bye-law set up by *Tucker*, was not a good bye-law; and that he being an Alderman of the said borough and town at the time of his election to be Mayor, was by the charter incapable of being chosen Mayor, and therefore judgment of *ouster* was given against him.

To reverse this judgment, the present writ of error was brought; and on behalf of the plaintiff in error, it was argued, that an Alderman is as much a Burgefs or inhabitant, as any other Burgefs or inhabitant whatsoever; that his being chosen into the office of Alderman, does not make him cease to be a Burgefs or inhabitant; and if he be a Burgefs or inhabitant,

N. Gundry.  
W. Murray.



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ant, he is qualified by the words of the charter to be elected Mayor. That if the words and letter of the charter allowed this construction, the sense and spirit of the charter plainly required it; for there was nothing more evident, than that the charter (being as it were a key to itself) considered Aldermen or capital Burgeses, as not ceasing to be Burgeses or inhabitants, but as continuing capable of any office which any inhabitant might enjoy. That *Henry Mitchell* and *Robert Fry* were appointed the first two Bailiffs under the charter, notwithstanding they were also amongst the four-and-twenty first named capital Burgeses in the charter: And the clause relating to the election of Bailiffs, was in the same words as that relating to the Mayor, *viz.* that the Bailiffs were to be chosen out of the Burgeses or inhabitants; which as strongly excluded a capital Burges from the office of Bailiff, as the other clause relating to the election of a Mayor, excluded an Alderman or capital Burges from the office of Mayor. That it was scarcely possible to conceive, that the Crown, after having by the charter selected out and named thirty-eight of the principal Burgeses or inhabitants of the town, *viz.* one for Mayor, two for Bailiffs, eleven for Aldermen, and twenty-four for capital Burgeses, should thereby intend to make those principal inhabitants incapable for ever after of bearing the office of Mayor, or of Justice of the peace: For the unavoidable consequence would be, that in so small a town as *Weymouth*, after thirty-eight were made incapable, the office of the greatest trust and power, and of most consequence to the public in general, as well as to the town in particular, must devolve upon the meanest of the inhabitants: It being undeniable, that if by the charter an Alderman was incapable of being chosen Mayor, a capital Burges was also incapable of being elected either Mayor or Alderman; and also, that neither an Alderman or capital Burges was capable of being elected a Bailiff. That the charter appointed but eleven Aldermen, as a number thought sufficient for the government of this town; and directed that every Mayor, after he had executed that office, should be an Alderman for life: If therefore, the charter was to be so construed, as necessarily to enforce the annual election of a Mayor to be out of the inhabitants and not the Aldermen, there might have been within 50 years after the charter, and might very probably now have been, fifty Aldermen within this little town: The charter also gave no power to elect an Alderman.



Alderman, until the number came to be under eight; but if new Aldermen must of necessity be introduced annually into the corporation, by choosing an inhabitant, not before an Alderman, into the office of Mayor, it could not be presumed that this power of electing an Alderman should ever take place. That the election of Mr. *Tucker* was conformable to the constant and uninterrupted usage ever since the charter, a period of more than 125 years; a usage fully proved upon the trial of the cause, when all the eight issues were found for Mr. *Tucker*, that he was duly nominated, elected and sworn into his office of Mayor; and a usage confessed also by the demurrer, which admitted the bye-law, tho' not extant in writing. Lastly, that it would be of very dangerous consequence to corporations in general, as well as to this in particular, if their charters were to be explained by nice and critical constructions upon words, contrary to the sense in which such words had been understood for centuries, and to the interpretation of them by constant usage from the time of granting the charters.

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In support of the judgment it was contended, that it appeared clearly by the charter in question, *the Burgeses or inhabitants* were in all elections distinguished from every other branch of the body, and were as much a separate part of it as the Mayor, the Aldermen, the Bailiffs, or the principal Burgeses. That by this charter, the four to be nominated out of whom the Mayor was to be chosen, were to be so nominated, not out of the Aldermen, or Bailiffs, or principal Burgeses, but out of *the Burgeses or inhabitants*. That *Tucker* in his pleadings insisted at first, that by the charter, the four out of whom the Mayor was to be chosen, could be nominated out of any part of the body, so as they were *Burgeses or inhabitants*; but by his rejoinder, he rested his defence upon a bye-law supposed to be made by the Mayor, Aldermen, Bailiffs, and principal or capital Burgeses, whereby the *Aldermen* or *Bailiffs* were capacitated to be put in nomination for Mayor: But surely this bye-law, if any such existed, was void in law; for though the Mayor, Aldermen, Bailiffs, &c. might by mutual consent, and to avoid popular elections and the confusion arising from them, abridge any particular election to a smaller number than the charter gave the power to; yet they could not transfer such franchise from that part of the body in whom it was vested

J. Strange.

R. Lloyd.



1742.

vested by the Crown, to another part who by the charter had nothing to do with it. That *Tucker*, by relying on this bye-law, had departed from his first defence which he was not by law entitled to do; and therefore, if there was no other reason, the judgment of the Court of King's Bench ought to be affirmed.

JUDGMENT  
affirmed.  
Jour. vol. 26.  
p. 174.

AFTER hearing counsel on this writ of error, it was moved to reverse the judgment; which occasioning a debate, the following question was agreed to be put to the Judges; *viz.* “Whether an Alderman of the borough of *Weymouth* is a Burgefs of the said borough; and is capable of being put in nomination, in order to be Mayor of the said borough, by virtue of the charter of the 14th year of King *James I.*” And the Judges present being directed to deliver their opinions, with their reasons, *seriatim*, upon this question; they were all heard accordingly, and declared their opinion to be, “That an Alderman was a Burgefs, but not to be considered as capable of being put in nomination to be Mayor.” — The Judges were then directed to deliver their opinions upon this question, *viz.* “Whether the rejoinder is a departure from the plea in bar; and what is the consequence thereof in point of law, upon this record?” And they having conferred together, the Lord Chief Justice of the Common Pleas acquainted the House, “That they were unanimously of opinion, that this is no departure in pleading, and cannot be at all material in the present case.” — Then after further debate, the question was put, Whether the judgment should be reversed? And it was resolved in the negative. Whereupon it was ORDERED and ADJUDGED, that the judgment should be affirmed; and the record remitted\*.

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\* It appears from a memorandum on this case, that the Judges present were, *Willes*, C. J. *Dennison*, *Burnet*, *Abney*, *Reynolds* and *Carter*: And that the House divided upon the question of reversal. Contents 14. Not contents 21.



*Isabella Le Neve*, Spinster, *Edward Le Neve*, Esq; *Peter Le Neve*, Gent. and *Matthew Graves*, Gent. and *Ann* his Wife; which said *Isabella*, *Peter* and *Ann*, were the Coheirs of *Oliver Le Neve*, and of his Brother *Peter Le Neve*, Esq; deceased,

Cafe 56.

Appellants.

*John Norris*, an Infant, Great Grand-son and Heir of *John Norris*, Esq; deceased, and *John Monck* and *Ann Norris*, Widow, Executors of *John Norris* the said Infant's Father,

Respondents.

16th April, 1744.

**O**LIVER Neve of Great Witchingham in the county of Norfolk, Esq; having no child or near relation, and being seised in fee of divers messuages and lands in the county of Norfolk, and in London and Southwark, of the yearly value of 1500*l*. conveyed and limited the same by lease and release, of the 7th and 8th of February, 1674, to the use of himself for life; remainder as to part, to his wife for life; and as for the residue and the part limited to his wife for life, after her decease, to Oliver Neve (by the name of Le Neve) second son of Francis Neve, for 99 years, if he so long lived; remainder to trustees to support contingent remainders; remainder to his first and other sons in tail male; remainder in like manner to Peter Neve (by the name of Le Neve) eldest son of the said Francis, for 99 years, if he so long lived; with remainder to trustees to support contingent remainders; remainder to his first and other sons in tail male; remainder to Francis Neve, son of Henry Neve, and his first and other sons in tail male; remainder to his own right heirs. With a power reserved to the testator, by his will, to devise the premisses limited to his wife after her decease, and also the residue for any term of years for payment of his debts, and such other purposes as he should declare: And a power of revocation. — Two parts of this settlement were executed.

3 Atkyns 26.



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The said *Oliver Neve* by his will, dated the 9th of *February*, 1674, devised to *John Norris* of *Witton* in the county of *Norfolk*, Esq; the infant respondent's great grandfather, and with whom the testator had been long and intimately acquainted, all his lands not settled upon his wife, and those that were settled, after her decease, for ten years, to be computed from his death, in trust to pay his debts, funeral charges and legacies; and after discharge of the said trusts, the overplus, if any, to be paid to the said *Oliver Le Neve* if then living; or if he should be dead, then to the said *Peter Le Neve*; or if he should be dead, then to the said *Francis Neve*, his executors or administrators: He gave to his cousin *Amy*, wife of the said *John Norris*, 100*l.*; to *Thomas Norris* his Godson, 100*l.*; and to the said *John Norris*, all his goods, chattels and personal estate not before bequeathed; and made him executor, and gave him 300*l.* for his trouble. The testator left his said will and one part of the settlement, in the hands of Mr. *Norris*, who was his counsel and drew the same according to his directions.

By a codicil, dated the 17th of *January*, 1678, reciting his will and revoking some legacies; the testator willed, that all his lands purchased since his will, should go to and for the same uses and estates as were limited by his will, of his lands in *Norfolk* not in jointure to his wife.

In a few days afterwards the testator died; and the said *John Norris* proved his will, and entered upon the estates devised to him for the trust term of 10 years as aforesaid.

In *August*, 1679, *Norris* agreed with *John Neve* of *London*, blacksmith, the heir of the testator, for the purchase of the reversion in fee, after all the intermediate estates, for 30*l.*; and by indentures of lease and release, dated the 1st and 2d of *August*, 1679, the said *John Neve* conveyed the same to him accordingly.

But previous to this transaction, and in order to keep the family ignorant of this *John Neve* and his relationship to the testator, *Norris* wrote a letter to *Francis*, the father of *Oliver Neve* the infant devisee, "Declaring a great concern for the safety of the will, and that he would not trust the same out of  
" his



“ his hands till he came to *London*, which he intended soon to  
 “ do for the proving it in Chancery, and that he should be  
 “ assistful to do therein for its best security, to all intents;  
 “ and assured the said *Francis*, he should to his best judgment  
 “ endeavour to have the intent of his testator performed for all  
 “ its purposes so far as laid in him; the trust thereof being  
 “ committed to him so wholly, which he said obliged all his  
 “ care and skill therein, which he declared he was not a little  
 “ solicitous to effect to his utmost, and in which he was ready  
 “ to comply with the best advice he could take, to secure the  
 “ ends the testator designed by his will.”

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In *October*, 1679, a bill in Chancery was exhibited by *Oliver Le Neve*, the infant, and the said *John Norris*, against *Elizabeth Neve* the testator's widow, and the said *John Neve*, as heir at law of the testator, stating the settlement, will and codicil; and praying, that the defendants might set forth what right they claimed to the estate, and that the witnesses might be examined to preserve their testimony.

The defendant, the widow, by her answer, insisted on her estate for life, in that part which was limited to her by the settlement; one part of which, she said, was delivered to her by *Norris*, since her husband's death.

The other defendant *John Neve*, by his answer said, he was the right heir of *Oliver Neve*, deceased, viz. the surviving son of *Francis Neve*, who was the eldest son of *John Neve*, who was the eldest brother of *Richard Neve*, father of the said *Oliver Neve*, deceased.

The witnesses to prove the deeds of settlement, will and codicil, were examined, to preserve their testimony; but no further proceedings were had in the cause, it being, in such cases, neither necessary or usual.

In *November*, 1681, *Francis Neve*, the father of young *Oliver*, died; and in *June*, 1683, *Oliver* attained 21; whereupon *Norris* settled all accounts with him, and, at his request, agreed to assign to him the remainder of the ten years term, of which but five years were then elapsed, and to put him into possession of



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of the estate, upon his executing a release of the rents and profits, and of the trusts wherewith *Norris* stood charged by the will and settlement; which release, they agreed, should not prejudice *Oliver*'s right to a lease of certain lands at *Scarning*, and as to which, they would abide by the judgment of the Court of Chancery; and accordingly, such assignment and release were executed.

Soon after this, a dispute arose between *Oliver Le Neve* and *Norris* about other parts of the testator's leasehold estates, which each of them apprehended himself entitled to; and thereupon, in *Easter* term, 1684, *Oliver* exhibited his bill in Chancery against *Norris*; praying, that he might be compelled to convey all the freehold, and assign all the leasehold estates of the testator to him, and deliver up all the writings relating thereto, and be decreed to perform the trusts reposed in him as to several leases in the bill mentioned, according to the will; and that the said release might be set aside, as to the freehold and leasehold estates of the testator, not comprised in the assignment from *Norris*.

To this bill, *Norris* put in his answer; and said, the testator declared to him, that he intended him all his personal estate, not specifically bequeathed; and that he conceived himself entitled to the leaseholds, one of which being of a shop in *Cornhill*, the lessor threatened to sue him for an incroachment made by the testator; upon which he surrendered the lease, and paid 50*l.* fine for a new lease, which he took in his own name, and was not above 8*l.* or 9*l.* a year more than the rent to the lessor; but submitted to the judgment of the Court, and said, he had delivered up all the rest of the lands and the writings concerning the same to the said *Oliver Le Neve*; but took no notice of the conveyance made to him by *John Neve*, the blacksmith.

No further proceedings were had in this suit; the parties having compromised the matters between them: And fourteen years afterwards, *Norris* made an assignment of some lease or leases to or in trust for *Oliver*.



In pursuance of an agreement with *Peter Le Neve*, the elder brother of *Oliver*, and who was next in remainder after him, and the issue male of his body; the said *John Neve*, the blacksmith, in *May*, 1688, conveyed his reversionary interest to the said *Peter Le Neve* and his heirs, in consideration of 10*l.* and died in *August* following.

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On the 1st of *August*, 1701, old *Norris* died; having, by his will, devised the reversion which he purchased of *John Neve*, the blacksmith, when the same should fall in, to his eldest son *John* (the infant respondent's grandfather) for life; with remainder to his first and other sons in tail male; with remainders over.

In *December*, 1708, *Francis Neve*, the third and last person in the intail under old *Oliver*'s settlement, died without issue.

*Oliver Neve*, being in possession of the estates, and having but one son living, an infant of so infirm a state of health, that it was apprehended he could not live to attain 21; and *Oliver* being not likely to have any more children, and *Peter* having no child, nor likely to have any; he, in 1709, applied to the infant respondent's grandfather, who was in great want of money, and offered him 2000*l.* and afterwards 3000*l.* to deliver up the conveyance from the blacksmith to his father; but the reversion being devised to him only for his life, he could not dispose of it further.

*Oliver Neve*'s son, being between 20 and 21, and very infirm, and his father not being able to purchase the reversion, they came up to *London*, in order to get a privy seal to enable the son, notwithstanding his minority, to suffer a recovery; but the infant respondent's grandfather entered a caveat at the proper office, which put a stop to it. And soon after their return into the country, the son died before he attained 21.

On the 26th of *November*, 1711, young *Oliver Neve* died without issue male; and thereupon his brother *Peter* entered into possession, and applied to Mr. *Berney*, who was counsel for the *Norris*'s family, and desired to see the conveyance of the reversion from the blacksmith to old *Norris*; and Mr. *Berney* asking his reason for desiring it, he said, he had a conveyance of



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the reversion from the blacksmith, and pretended he wanted to see which of the two conveyances was prior. — Mr. Berney, not having before heard of the conveyance to Peter, answered, if he would shew his deed, the other should be produced at the same time, but Peter refused.

After this, the said Peter Le Neve applied to Mrs. Earl, a friend of the Norris's, and told her, he was desirous of purchasing Mr. Norris's reversion in this estate, and would give 5000*l.* for it, which would be of great service to him, who was incumbered and frequently arrested; and upon her saying, she thought it not a valuable consideration, he said he would give more, and desired her to speak to him, which she did; and Norris's answer was, he had not power to sell it.

In January, 1716, John Norris, the infant respondent's grandfather died; leaving John Norris, his only son and heir at law.

Peter Le Neve, being a widower about 64 years old, and pretending some claim to the reversion, made a proposal in 1725, to marry a sister of the infant respondent's father, then about 15 years old and having but a small fortune; and insinuated to Mr. Berney, that if this was accepted, he would yield up his claim to the reversion in fee, upon which a meeting was had, but the proposed provision for the young lady being thought not sufficient, the matter broke off.

On the 1st of October, 1729, Peter Neve died without issue; having made his will, whereby he devised all his lands and hereditaments in Norfolk, Middlesex, Surry and London, the reversion whereof he had purchased from John Neve, the blacksmith, to the three daughters of his late brother Oliver, and their heirs; namely, the appellant Isabella La Neve, Henrietta, late wife of the appellant Edward Le Neve, and mother of the appellant Peter Le Neve, and Ann then wife of Dr. Rogers, and mother of the appellant Ann Graves; and they, as coheiresses and devisees of Peter, got into possession of a considerable part of the estate, and got most of the deeds relating thereto.

All the limitations in the first settlement being spent upon the death of Peter Neve, without issue, the reversion in fee became vested in John Norris, the infant respondent's father; who,



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who, in April, 1730, (being then an infant) brought his bill in Chancery, against the appellants *Isabella Le Neve*, *Edward Le Neve* and *Henrietta*, his then wife, and *John Rogers* and *Ann* his wife; praying, that they might set forth what right they claimed to the estate, and account for the profits, and deliver up possession, and all deeds and writings concerning the same, and that witnesses might be examined to perpetuate their testimony. — No answer was put in to this bill.

In *Easter* term, 1731, the respondent's father (being still an infant) brought ejectments for the lands in *Norfolk*, whereto the defendants to the last mentioned bill appeared, and made themselves defendants with the tenants in possession; and upon a long trial by a special jury, before the Lord Chief Justice *Raymond*, at the Summer Assizes, 1731, and full defence made; a verdict was given for the plaintiff for all the freehold lands in that county, except *Shackle's Farm*; which, by an act of Parliament in 1696, was vested in trustees for the same uses as the lands recovered; but the plaintiff's counsel were not then apprised of that matter.

Judgment being entered on this verdict, the defendants brought a writ of error, and afterwards filed their cross Bill against the respondent's father; in which they charged, that old Mr. *Neve*, the settlor of the estate, acquainted Mr. *Norris*, who was a barrister at law, with his mind to settle his estate upon the said *Oliver*, *Peter* and *Francis Neve*, and their first and other sons in tail male, as before mentioned; and for default of such issue, so as that the same might remain in the family of the said *Oliver* and *Peter*, sons of *Francis Le Neve*, of *London*, draper, whom he supposed to be his right heir; and that *Norris* declared him to be the nearest relation then known, and prepared the settlement and will accordingly. — That the grantor's intention was to preserve the estate in his own name and blood; and that *Norris* ought to be considered as a trustee only, for the parties interested in the said trust estate. — That *Norris*, on the death of the testator, possessed the personal estate, and received the profits of the real for five years, and had an overplus beyond what would pay debts and legacies, but refused to quit possession, unless *Oliver*, *Peter* and *Francis* would



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would release. — That *Oliver* being under difficulties, was forced to comply, and executed a release, and took an assignment of the remainder of the ten years term, by deed of the 2d of *October*, 1683. — That soon after the death of the grantor, it was rumoured, that one *John Neve*, a blacksmith in *London*, was his heir at law; and thereupon *Oliver* and *Peter Neve* complained to *Norris*, who was soon to go to *London*, that if the report was true, he had done ill by limiting the remainder in fee to the right heir of the grantor, which he knew was contrary to his directions; and that it was so done, upon his assuring the grantor, that their father was the right heir. — That at the request of *Peter*, *Norris* undertook to enquire after the blacksmith, and get an account of his pedigree, and prepare a conveyance of the reversion from him to *Peter* and his heirs, for such consideration as he could agree on; but that on his return, he said he had enquired, and could not hear of any such person. — That *Peter Neve* going afterwards to *London*, found a person who went by that name, of low condition, and told him of the report, and shewed him the settlement; who declared he was a stranger to the grantor, and did not know whether he was related to him or not; but if he was his heir at law, he had no hopes of the estate after so many limitations, and therefore agreed to sell his reversion to *Peter* for 10*l.* and accordingly conveyed it to him and his heirs by bargain and sale, dated the 1st of *May*, 1688, inrolled in Chancery. — That *Peter* did not suspect, that *Norris* had purchased the reversion; nor did *Norris*, who was privy to *Peter's* purchase, ever intimate that any conveyance had been made to him, but always declared himself to be no other than an executor in trust, without setting up any claim to the reversion. — That as counsellor to the family of the *Neves*, he got into his possession all the deeds and writings belonging to them, whereby their pedigree might be made out; and that the infant respondent's father had brought ejectments, and recovered judgment for the freehold lands: And therefore, the bill prayed a discovery of all the deeds and writings; and that they might be delivered up, and the conveyance to *Peter Le Neve* from the blacksmith established, and that to *Norris* cancelled; and all proceedings upon the ejectment stayed.



In *Michaelmas* term, 1731, the respondent's father, (being still an infant) delivered other ejectments for *Shackle's Farm*, and such of the estates as lay in *London* and *Southwark*; but before any further proceedings were had, either at law or in equity, the defendants to the original bill, and plaintiffs in the cross bill, came to an agreement, which was reduced into writing, and signed by the Clerks in Court for all parties; by which it was agreed, that the copyhold and leasehold lands, which lay intermixed with the freehold, should be distinguished when *John Norris* came of age; and that the *Neves* should be allowed a fair rent for the same, to be judged by two indifferent persons, and be let into possession. — That *Norris* should, without trial, be let into possession of all the freeholds in *London*, *Southwark* and *Norfolk*, comprised in the blacksmith's title. — And all proceedings in law and equity were to remain as they were, till *Norris* came of age, except the examination of witnesses *de bene esse* on both sides. — And that *Shackle's Farm* should be presumed to be part of the *Norfolk* freeholds.

*John Rogers* and *Ann* his wife soon after died; leaving issue the appellant *Ann Graves*; and *Henrietta*, wife of the appellant *Edward Neve*, died; leaving issue the appellant *Peter* and the respondent *Elizabeth*.

On the 7th of *October*, 1735, *John Norris* died, leaving the respondent *John Norris*, his only son and heir; who, in *November*, 1740, filed his bill of revivor and supplement against the appellants and *Ann Norris* his mother, and *John Monck*, as executors of his father, and *Denshire*, *Stukly* and *Cust*, as administrators of *John Rogers*; praying, that they might set forth whether they insisted upon any and what title, to any and what part of the estate in question. — That they might inspect all the deeds, papers and writings, and distinguish the copyhold from the freehold, and that the same might be divided by commission of partition. — That the infant might be let into possession of the freehold, and his right established. — That he might have the benefit of the agreement made by the Clerks in Court, and all the deeds and writings delivered up to him; and an account of the rents and profits of the freehold estate, and the benefit of all the proceedings at law and in equity; and be quieted in possession.



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The appellants put in their answer to the same effect with the cross bill filed ten years before; and particularly insisted, that *John Norris* concealed his conveyance from the *Neves*; that his taking it was a breach of trust, and that he ought to be deemed a trustee for *Peter* and his heirs. — They said, they had caused all the deeds and writings in their custody or power to be inspected by their solicitor; but could not thereby distinguish the freehold and copyhold lands. They admitted the agreement by the Clerks in Court; but said it was not intended to bind, nor could bind the interest of any of the parties; and hoped they should not be concluded thereby, or be obliged to account for the rents and profits of the estate; but that the respondent's great grandfather should be deemed a trustee for them, and the respondent be obliged to account with them for the rents and profits.

The other defendants having put in their answers, a commission issued for the examination of witnesses, in which the appellants joined; but did not examine any witnesses, tho' several were examined for the infant respondent. On whose behalf an order was made, that he should be at liberty, at the hearing of the cause, to read the bill, answers and depositions in the cause, *Neve* against *Neve* in 1679.

On the 17th of July, 1742, the cause was heard before the Lord Chancellor *Hardwicke*; when it was referred to a Master to take an account of the rents and profits of the freehold estates, to which the infant respondent was then entitled, which had accrued since the death of *Peter Neve*; and that what should be found to have accrued due in the life of the infant respondent's father, should be paid to his executors; and what was due since his death, should be paid into the Bank for the benefit of the infant: And that the appellants *Isabella* and *Edward Neve* should deliver possession of *Shackle's Farm* to the infant respondent's guardian for his use; and that the rest of the freehold estate should be distinguished from the copyhold and leasehold lands belonging to any of the appellants; and a commission was to issue, to set them out by metes and bounds, and that all deeds, &c. in the hands of any of the parties, should be produced upon oath before the Commissioners; and  
such



such as should belong to the freehold, should be delivered to the infant respondent's guardian for his benefit.

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A commission accordingly issued, which was soon after executed by the Commissioners named by all parties; and the estates were distinguished and set out by metes and bounds.

In *February* following, the infant respondent preferred his petition, that the cause might be set down for further directions on the return of the commission, and as to other matters reserved at the hearing; but before the same could come on, the appellants preferred their petition, setting forth, that since the decree, they discovered that they were heirs at law to the blacksmith, who was dead without issue, which they had never heard of before; and therefore they did not, nor could claim as his heirs: And that the appellant *Matthew Graves* had married the appellant *Ann* after the decree; and praying leave to exhibit their supplemental bill, in the nature of a bill of review, and to apply for a rehearing, and that all proceedings upon the decree might be stayed.

On the 2d of *June*, 1743, this petition came on to be heard; and to prove that the appellants were heirs to the blacksmith, they made an affidavit, which was read, whereby they swore positively to their own and the blacksmith's pedigree, so far back as the year 1601. But it being impossible the particulars could fall within their knowledge, the Court ordered the petition to stand over, till the day of petitions after *Michaelmas* term; and that both sides should file their affidavits by a certain time in the order limited.

Several affidavits were accordingly filed for the appellants, and several in answer to them for the infant respondent; by which it appeared, not only that the appellants were not heirs to the blacksmith, but that the infant respondent probably was; and certainly was much nearer of kin, both to the blacksmith and old *Oliver Neve*, than the appellants, or those under whom they claimed.

On



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On the 22d of *October* following, the petition came on, again to be heard; but the appellants did not think proper to attempt to support it, and therefore suffered it to be dismissed with costs.

However, in a few days afterwards, the appellants preferred another petition; wherein they set forth most of the allegations of their former petition and their bill and answer, excepting that of their being heirs to the blacksmith, and particularly the manner of obtaining *John Norris's* conveyance from *John Neve* the blacksmith; his having been employed as counsel by old *Oliver* in many conveyances, particularly in this settlement, and in preparing his will; and being a trustee in it, his being guilty of a breach of trust in making the purchase, and in concealing it from the appellant's ancestors; and that therefore it ought now to be deemed to have been a trust for, and should have been taken in the names of *Oliver, Peter* and *Francis Neve*, to whom the estates were successively limited; and that they had lately, since *June* last, discovered several new evidences to make out these allegations; and set forth these new evidences to be a letter of the 3d of *April*, 1679, to *Francis Le Neve* from old *Norris*, wherein he said, he would endeavour to have the intent of his cousin *Neve*, the testator, performed; the trust thereof being committed to him. — The bill filed the 23d of *October*, 1679, against the widow *Neve* and the blacksmith. — The widow's answer. — The bill filed 16th *May*, 1684, by *Oliver Neve* against old Mr. *Norris*, and the answer. — The assignment by old Mr. *Norris* in *August*, 1698, of several leases to trustees, in trust for *Oliver Neve*. — The release to old *Norris* by the *Neves*, and several deeds, to which he was a witness. — And they alledged, that their solicitors and agents were ignorant of any legal proof thereof, or of any of the new facts now alledged, at the hearing of the cause. — They likewise alledged, that old Mr. *Norris's* purchase was made, whilst he was in possession of the estate, in trust for the appellant's ancestors; and therefore he ought not to be allowed to purchase for his own benefit. — That in regard the evidence the appellants would offer, was not such as could be liable to any suspicion, the greatest part being ancient written proof, and chiefly from the records of the Court; and



and that the appellants were ignorant of these new matters, and of the proofs of the facts alledged in their answer, at the hearing; and in regard also, to the dangerous precedent of suffering a man of law intrusted in a family, and in possession of their estate, by a will and deed of his own making, to acquire to himself and his family at any distance of time, or under any contingency, an unjust advantage of the trust reposed in him; they prayed as in their former petition.

This second petition was heard before Lord *Hardwicke*, on the 28th of *January*, and 4th and 8th of *February*, 1743; when the appellants read fourteen affidavits, three of which were made by *William Havers*, their Solicitor in the cause; who swore, that till the 20th of *June* last, he did not know that the appellants could prove old Mr. *Norris* was counsel for old Mr. *Neve*, or prepared his settlement and will, or that he purchased the reversion whilst he was in possession for *Oliver Neve*, — or that he took any lease of any part of old Mr. *Neve*'s estate in his own name, — or that the deponent knew of the proceedings in 1679, and 1684. — Three other of the affidavits were made by *Thomas Martin*, one of the executors of *Peter Neve*; who swore, that on the death of *Peter Neve* in 1729, he found in his study, old Mr. *Neve*'s settlement of 1674, and a copy of his will, and several purchase deeds attested by old Mr. *Norris*, which had been in the deponent's custody ever since, till he delivered them to the appellant *Matthew Graves*, in *May* and *November* last; and that the appellants never saw them before. That he knew not of the suits in 1679, and 1684, till *June* last; and in answer to an affidavit of his being Solicitor in these causes, for the appellants *Isabella* and *Edward* and his wife, and *Rogers* and his wife, and that he was Attorney also for them in the defence of the ejectment; *Martin* swore, that he was Attorney for the appellants in the ejectment, but was not concerned as Solicitor on the defence set up by them in this suit. That he never saw the bill of revivor in 1740, nor the answers or copies. — Had several meetings with the respondent's father's Solicitor, and acted for the appellants under the directions of the parties, or some of them, or of *Havers* or *Bowyear*, who had the sole conduct of the cause for the appellants; but that he was not concerned as Solicitor, otherwise than as aforesaid.



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The other affidavits were chiefly made by the appellants, who swore, that they knew not of the writings in *Martin's* hands, till he delivered them to the appellant *Graves* as aforesaid; nor of the suits in 1679 and 1684. — The appellant *Graves* swore, that after *Martin* had delivered him the said writings, he observing upon one of them the title of a cause, *Neve* by Guardian, plaintiff, against *Neve* defendant; he found at the Tower, the records in that cause, and in the other of *Neve* against *Norris*; but not the blacksmith's answer, or any depositions. — The appellants also read the letter of the 3d of *April*, 1679, before mentioned, to *Francis Neve* from *Norris*.

For the infant respondent, the affidavit of *Jeremy Harcourt* was read; who swore, that at the trial of the ejectment in 1731, *Thomas Martin* acted as Attorney for the appellants, the then defendants; and that this deponent proved copies of the bill in 1679, and the blacksmith's answer, which were then read as evidence. — That *Martin* was concerned as Solicitor in this cause for the appellants, in *May*, 1732, when a commission was going to be executed to examine witnesses *de bene esse*; and that Mr. *Lock* attended as Commissioner for the appellants. — An agreement was also read, signed by *Snell*, the respondent's father's Attorney, and *Martin* as Attorney for the appellants, about the trial of the ejectment. — Another agreement, dated the 11th of *April*, 1732; whereby *Martin* promised to engage *Lock* to attend the commission. — And *Martin's* letter to *Snell* of the 11th of *May*, 1732; wherein he said, "We are not prepared to join in commission next week." The affidavit of one *Francis Saul*, who swore that he served the appellant's clerk in Court, personally, with the order of the 1st of *February*, 1741, that the respondents, at the hearing of this cause, might read copies of the bill, answers and depositions, taken in 1679. — And an affidavit of one *John Monck*, setting forth the infant respondent's pedigree; and that the deponent believed him to be heir at law of the blacksmith.

And upon reading the settlement and will in 1674, the blacksmith's conveyance, and the bill, answers and depositions in 1679 and 1684; and several purchase deeds of old *Neve*, attested by *Norris*; and the verdict in ejectment 1731; and after three days hearing of counsel, it was ordered, that the petition should be dismissed.

From



From this order of dismissal, the petitioners appealed; and on their behalf it was argued, that the conveyance to old *John Norris* by *John Neve* the blacksmith, of his right to the lands comprised in the settlement of 1674, from all the circumstances under which it was obtained and concealed, ought, in a Court of Equity, to be deemed a trust for *Oliver Neve* the younger; it being most manifest, that the whole transaction was an unjust and fraudulent scheme on the part of old *Norris*, abusing the confidence of old *Oliver Neve*, who had for many years employed him as his family Lawyer, by turning the knowledge he thereby acquired of the affairs and pedigree of the family to his own advantage; abusing the trust reposed in him by the will, in breach of the duty he owed the infant *Oliver*, who was incapable of acting for himself, and for whom *Norris* was a trustee, and by means thereof at that time in possession of the whole estate, and all the family deeds and papers; and for whose interest he promised to do every thing in his power, and thereby inducing the friends of the infant to rely entirely on him, while he was privately acquiring to himself the inheritance of the infant's estate; and using means in the name and under colour of serving the infant, by filing a bill against *John Neve* as heir of old *Oliver*, to give strength and countenance to the title of *John Neve* the blacksmith, as his heir; and which in fact had so far succeeded, that upon the trial of the ejectment in 1731, this very contrivance was used as evidence of the blacksmith's pedigree. That it was impossible to account for the silence of this bill, and the answer of the blacksmith, as to this conveyance, but from a consciousness in *Norris*, that this matter would not then bear being divulged; and in hopes, that if the whole conduct of the infant's affairs was left to his management, he might by long concealment and artful contrivances, ripen a purchase originally founded in fraud and a gross breach of trust, into a good title. And with the same view, he detained one part of the original settlement, and several other material deeds and evidences, which were in fact produced by his descendants, partly at the trial of the ejectment in 1731, and partly upon executing the commission of partition; although by his answer to the bill filed in 1684, he positively swore, that he had delivered up all deeds and writings belonging to the estate, except some old writings in a chest.

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W. Murray.

W. Noel.

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That public convenience (which is a source of equity from whence many and various determinations have been drawn) required, that such a purchase as this should be held to be a trust; for otherwise, no family in *England* could be safe. Most Gentlemen of estates are obliged while they live, to let some country lawyer into the knowledge of their affairs; and when they die, persons under this description, are commonly left guardians and trustees; and if they may be permitted while acting under such confidence, and in such capacities, to purchase for themselves any dormant titles, or remote reversions of the estates of those families for whom they are concerned; their situation gives them such opportunities, as may prove to many too strong a temptation to do that for their own benefit, which an honest agent or trustee ought to do for the benefit of the family. And they will be induced to discover titles or reversions standing out, for the sake of getting them to their own use, which otherwise might never be known, or be incapable of being proved, and which therefore they will be always able to pick up for mere trifles; as in the present case, where an estate of 1500*l.* a year, has been got in consideration of 30*l.*

As to the objection, that the appellants ancestors *Oliver* and *Peter Neve* had long submitted to, and acquiesced under this purchase as a fair one; no argument could be drawn from any such acquiescence. Because, old *Norris* industriously concealed to the time of his death, having obtained any conveyance from *Neve* the blacksmith, though called upon by the bill filed in 1684, to discover what interest had come to him, as well touching the leasehold as the inheritance; and suffered the family to believe, that the conveyance to *Peter* was valid. From *Norris's* will it took air, that he had obtained some conveyance; and *Oliver* first heard of it about 1709. But the descendants of old *Norris* constantly concealed the time when, and the circumstances under which the conveyance was made; and *Oliver* had then a son nearly of age, and he himself lived but two years after. That *Peter Neve* never knew when, or how this conveyance to *Norris* was obtained; and under that ignorance of the true state of the case, treated about its being produced and delivered up, but always disputed it, tho' he might not think it prudent to commence a suit, when it was uncertain whether the reversion would ever take effect: Besides, all the parties to  
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the transaction were dead, before it is pretended that either *Oliver* or *Peter Neve* ever heard of any conveyance having been obtained by old *John Norris*. That the appellants defence in the cause, was very different from the equity now insisted on; the ground of that defence being, that *Norris* having been employed as an agent for *Oliver* or *Peter Neve* to buy out the blacksmith's right, had purchased it for himself, and therefore ought to be considered as a trustee for those whose agent he was: But the equity which the newly discovered evidence supported and verified, was neither known or in issue in the cause; and if this evidence had been discovered even before publication passed in that cause, yet it could not have been made use of at the hearing, to prove what was not put in issue; and this circumstance brings the case within the old rule of the Court relating to bills of review with supplemental matter, and within a late rule concerning original bills in the nature of such bills of review; and consequently, entitles the appellants to have the use and benefit of such evidence.

It has however been objected, that the evidence now produced and insisted on as a new discovery, and material to the merits of the case, is not a new discovery; but either was, or must be presumed to have been known to the appellants themselves, or to their agents, in whose custody it appears to have been.

But to obviate any objection of this nature, the appellants themselves and also their agents, have positively sworn, that they were in fact ignorant of this evidence till long after the former hearing and decree; and knowledge or notice is not in this case to be presumed; but on the contrary, there was much more reason to presume that the appellants and their agents were ignorant of this evidence, from its not having been mentioned or made use of in the cause, than there was to presume that they knew of it, merely because part of it was in the custody of *Martin*, who was never concerned for the appellants, save only upon the trial of the ejectment, and the execution of the commission for examining witnesses *de bene esse* in the country, which was eight years before the bill was filed, upon which the present decree was made: And the rather, as this evidence happened to be in his custody not as an agent for the appellants,



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but in another capacity, as executor of *Peter Neve*. Besides, the most material parts of this newly discovered evidence, viz. the blacksmith's answer to the bill filed in 1679, and the bill filed in 1684, together with the proceedings thereon, were not pretended to have been in *Martin's* custody at all, or in any degree known either to the appellants or their agents. That a part of this new evidence happening accidentally to be in the hands of *Martin*, not by any delivery from the appellants, but by means of his being an executor of *Peter Neve*, was so far from being a circumstance to induce a presumption of the appellants having notice of that evidence, and that therefore they ought to be precluded from having the benefit of it now; that there were instances, where persons standing in the same light with the present appellants, had been permitted to have the use and benefit of evidence as newly discovered, altho' it appeared to have been all along in the custody of the parties themselves; and where its having been so in their custody, was not a sufficient reason from whence to presume that they knew of that evidence, and might have made use of it before. Lastly, that the whole of what the appellants were now contending for was, not a determination of the title to this estate in their favour, but only that the merits of their case, as it stood on the new discovered evidence, might once be, which it had not yet been, submitted to the judgment of the Court: And no danger of perjury, or subornation of perjury could arise from admitting this evidence; as it consisted not of the testimony of witnesses, but only of authentic records and acts of Court, or written instruments, deeds and letters, under the hand of old *John Norris* himself.

D. Ryder.

J. Browne.

On the other side it was contended, that by the established practice of the Court, there are but two sorts of bills of review; one founded on supposed error appearing in the decree itself, which was not charged to be the present case; the other, on new matter. As to this, by the known rule of Lord *Bacon*, which has been constantly adhered to, no bill of review is to be admitted, unless it contains some new matter which hath arisen in time after the decree; or upon new proof, which could not have been used at the time when the decree passed. The latter part of this rule was what the appellants founded their application upon. Now, in order to entitle themselves upon the foot  
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of new proof, it must appear, that this supposed new proof was unknown, not only to the appellants, but to their Attorney, Solicitor and Agents; for notice to them is, by the clear rule of the Court, considered as notice to the parties themselves; and that it was also material to the relief prayed. But this was so far from being true, that all the deeds, letters, papers and writings, now insisted on as new matter, came to the hands of *Thomas Martin*, one of the executors of *Peter Neve*, so lately as 1729, when *Peter* died; and were now produced by him, who was Attorney and Solicitor for the appellants both in the ejectments and the bills in Chancery, in 1730, and 1731: And tho' the fact of his being Solicitor was endeavoured to be denied, yet it was fully proved by writings under his own hand, and the affidavits produced by the respondents. As to the bill filed after *Norris's* purchase, to perpetuate the testimony of the witnesses to the will, a copy of that bill and of the answer were actually read for the respondent's father, at the trial of the ejectment in 1731; and the Clerk in Court for the appellants, was in *February*, 1741, served with an order to read them at the hearing of this cause below. That all the facts alledged by the appellants in their petition for a bill of review, were stated in their cross bill filed in 1731, and in their answer to the respondent's bill in 1741; and appeared by the records of the Court, and were in issue at the hearing. All the material proofs of these facts were known to *Oliver* and *Peter Neve*, long before the appellants had, or could set up any claim. And so long ago as 1709, a year after the death of *Francis Neve*, one of the remainder-men, without issue; *Oliver* was so well apprised of the right of the respondent's grandfather, that he offered him 3000*l.* to deliver up the blacksmith's conveyance. And soon after *Oliver's* death, without male issue, his brother *Peter*, when in possession of the estate, and not likely to have any issue, offered 5000*l.* for the reversion, tho' he had got a conveyance of it to himself in fee for 10*l.* in *May*, 1688; and which small sum he probably thought it worth while to give for a pretence to embarrass the matter, and dispute the reversion with *Norris's* family: And even after this time, *Peter* made farther overtures, by offering, in 1725, to marry old *Norris's* daughter with a small fortune, and to deliver up his claim to the reversion, if they could agree upon terms; but during all these treaties, no pretence was ever set up, that *Norris* had been guilty



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guilty of any breach of trust as to the appellants ancestors, or imposition on the heir of old *Oliver*, or that he was a trustee of this reversion for any of them. That there were but two pieces of evidence mentioned in the appellants petition, which had not before been mentioned in any of the proceedings: One was a letter in *April*, 1679, from old *Norris* to *Francis Neve*, the appellant *Isabella's* grandfather, saying that he would perform the trusts in the testator's will committed to him; which letter must have been in the appellants family from the time of its date. And the other was, that the appellants had found twenty deeds of purchase made by old *Neve*, and witnessed by old *Norris*; But neither of these pieces of evidence was at all material to the point in question.

That the equity insisted on by the appellants was, that *Norris*, who was Counsel for old *Neve*, and drew the settlement and will, purchased the reversion in fee to himself at an under value, when he was in possession of the estate, under the trust term of ten years; and that therefore the purchase of this reversion, ought to be construed as a purchase in trust for *Oliver*, *Peter* and *Francis Neve*.

But in answer to this it must be observed, that *Norris* was only a trustee of this ten years term, for payment of debts and legacies, with the surplus rents to *Oliver* if living, or else to *Peter* if living; and if not, then to *Francis Neve*, his executors or administrators: That this term was antecedent to all the limitations to *Oliver*, *Peter* and *Francis Neve*, who were only successive tenants for 99 years, if they so long lived, with several remainders to their first and other sons in tail male: And, that the remainder in fee was neither limited or intended to go to any of them, or to any issue which they might have, none of them having issue at that time, but was limited to the right heirs of the grantor; and was a separate and distinct interest, which neither *Oliver*, *Peter*, or *Francis Neve*, could claim by the course of the settlement. Besides, it was absolutely impossible to say, for which of the *Neve's* *Norris* was a trustee; whether for *Oliver* the first taker, or for *Peter* or *Francis*, or their sons, or for all of them, jointly or separately; and in what proportions, or whether in fee, or in tail, or for lives; or whether altogether, or in succession, according to their original



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original limitations; and if in succession, what should become of the reversion in fee again, which still remained as it was before. Nor could there be any ground of trust shewn for *Oliver* or *Peter*, under whom alone the appellants could claim; but what would hold equally, and perhaps stronger for *Francis*, who was the nearest to the reversion, but under whom the appellants could derive no right.

That the appellants had attempted to resemble this case, to the case of trustees renewing terms of years for their own benefit; but the cases totally differed, not only in the respects before mentioned, but in this essential point; that the equity on which those cases all depend, is the supposed tenant-right, or expectation, and the known usage of renewal, which was intended to be united with, and become part of the trust estate: But here it was the very reverse, it being so far from the view of the grantor, that the reversion should go to the particular precedent owners, that his intent was to keep it out of their hands, and carry it into another channel. As to the pretence of an unequal consideration, and the fraud supposed to arise from thence, there was no rule of computation by which this could be shewn to be too small; and it was in fact a greater consideration, than *Peter* himself gave for a much nearer reversion: But whatever colour could be given for such a charge, it could afford no equity to the appellants, unless it could be shewn, that a fraud upon one man, can create a trust for another; or that *Norris's* purchasing the reversion at an under value from the blacksmith, made him a trustee, not for the vendor of the reversion, but for the owner of the particular estate which preceded it. That it was now above 64 years since the purchase of this reversion by old *Norris*; and if the family of the *Neves* thought there had been any fraud or breach of trust, there could be no doubt of their inclination and ability to make it appear; and if after such a long acquiescence, the appellants were to be permitted to bring a bill, in the nature of a bill of review, it would create endless vexation and delay, from which the appellants would derive a very unjust advantage; for after this distance of time, it would be impossible for the respondent, who was the great grandson of *John Norris*, the purchaser, to clear up many facts, which might have been easily proved and explained, if disputed while the parties to those



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ORDER  
affirmed.  
Jour. vol. 26.  
p. 367.

transactions had been living. It was therefore hoped, that the order would be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Case 57. *John Martin*, on the Demise of *Thomas Tregonwell*, Esq; } Plaintiff  
*John Strackan*, the Younger, } in Error.  
Esq; and *Luke Harrison*, } Defendants

17th April, 1744.

Strange 1179.  
1 Will. 2, 66.

*Willes's*  
*Rep. AAA.*

THE plaintiff brought his ejectment in the Court of King's Bench for one messuage, three gardens, three orchards, 20 acres of land, 20 acres of meadow, 20 acres of pasture, and 1000 acres of wood, with the appurtenances in *Milton Abbas*, in the county of *Dorset*. To which the defendants appeared, and entered into the common rule to confess lease, entry and ouster, and pleaded not guilty; upon which issue was joined.

In *Michaelmas* term, 1728, the cause was tried at bar, and the jury found a special verdict to the effect following; viz.

That upon the 13th of *August*, 1639, *John Tregonwell* was seised in fee of divers manors, messuages, lands, tenements and hereditaments in the county of *Dorset*, of which the premises in question were parcel; and that he had issue two sons, *John* and *Thomas*; and on the 4th of *October*, 1650, died seised of the premises. After whose death the same descended to *John*, his eldest son, who entered and was seised thereof, and had issue *John*, his son; and being so seised, on the 6th of *December*, 1667, died, after whose death the premises descended to *John*, his son; and he the said *John*, the grandson, entered and was seised, and had issue two daughters, *Mary* and *Katherine*, and

no



no other issue. That on the 3d of June, 1680, by indenture quadrupartite of that date, made and executed between him, by the name of *John Tregonwell* of *Milton Abbas*, in the county of *Dorset*, Esq; and *Jane* his wife of the first part, *Francis Lutterell*, of *Dunstar Castle*, and *Mary*, the eldest daughter of the said *John Tregonwell*, of the second part, *John Jones* and *Thomas Siderfin* of the third part, and *Peregrine Palmer*, *Thomas Palmer*, *John Harding* and *Samuel Pitt* of the fourth part; the said *John Tregonwell* did covenant with the said *Francis Lutterell* and his heirs, that the said *John Tregonwell* and *Jane* his wife would, before the end of *Trinity* term then next, levy a fine *sur conusance de droit come ceo*, &c. with proclamations to the said *Jones* and *Siderfin*, or their heirs, of all those farms called *Delcomb Farm*, *Windmill-Ashes*, *Huish Farm*, *Lushcombe Farm* and *Chestcomb*, alias *Churcomb Farm*, and of all lands, tenements and hereditaments thereto belonging, and of all manner of tithes of the said premisses, and of the manor of *Milton Abbas*, and of all rents of assize thereto belonging, and of the coppice woods, containing 1600 acres, and of the impropriate parsonage rectory of *Milton Abbas*, the impropriate tithes of *Wooland*, the impropriate tithes of *Widcomb*, of *Holworth*, and also of a portion of tithes in *Milbourne St. Andrews*; to make the said *Jones* and *Siderfin* tenants in a precipe for suffering a recovery; which, when suffered, was declared to be as to the farm of *Delcomb*, with the appurtenances, and all manner of tithes arising out of the same, to the use of the said *John Tregonwell* and his heirs, till an intended marriage between the said *Francis Lutterell* and *Mary Tregonwell* should be solemnized; and after that marriage, to the said *Francis Lutterell* for his life; remainder to the said *Mary Tregonwell* for her life. — As to the mansion house of *Milton Abbas* and the appurtenances, to the said *John Tregonwell* for life; remainder to *Jane Tregonwell* for her life; remainder, if the said marriage took effect, to *Francis Lutterell* and *Mary*, his intended wife, for their lives and the life of the longest liver of them. — And as to *Delcomb Farm*, after the limitations to the said *Francis Lutterell* and *Mary Tregonwell*; and as to the said mansion house and its appurtenances, after the limitations to the said *John Tregonwell* and *Jane* his wife, *Francis Lutterell* and *Mary Tregonwell*, to the said *Peregrine Palmer*, *Thomas Palmer*, *John Jones*, *John Harding*,



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*Harding, Thomas Siderfin and Samuel Pitt*, and their heirs, to support contingent remainders; and then to the use of the said *Peregrine Palmer*, and the other trustees, their executors, &c. for 200 years; then to the use of the first and every other son of the body of the said *Francis Lutterell* and *Mary* in tail male; remainder to all and every the other son and sons of the said *Mary* in tail male; remainder to *Katherine Tregonwell*, youngest daughter of the said *John Tregonwell* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the body of the said *Katherine* in tail male; remainder to the daughter and daughters of the said *Mary* and *Francis* in tail; remainder to the other daughter and daughters of the said *Mary* in tail; remainder to the daughter and daughters of *Katherine* in tail; remainder to the right heirs of the said *John Tregonwell*. — And as to the said farms, called *Windmill-Ashes, Huish and Lushcomb*, with their appurtenances, and all manner of tithes arising out of the same, to the said *John Tregonwell* and *Jane* his wife for their lives, and the life of the longest liver of them; remainder to *Katherine* for life; remainder to such person as should be her husband at the time of her death, for life; remainder to trustees to support contingent remainders; remainder to the trustees and their executors for 200 years; remainder to the use of the first and every other son of the body of *Katherine* in tail male; remainder to the said *Mary Tregonwell* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said *Mary* in tail male; remainder to the daughter and daughters of *Katherine* in tail; remainder to the daughter and daughters of *Mary* in tail; remainder to the right heirs of the said *John Tregonwell* in fee. — And as to the manor of *Milton Abbas*, rents of assize thereto belonging, the farm of *Chestcomb*, alias *Churcomb*, the parsonage of *Milton Abbas*, tithes of *Wooland, Widcomb* and *Holworth*, and the portion of tithes in *Milbourne St. Andrews*, to the said *John Tregonwell* for his life; remainder, as to one half thereof, if the said marriage should take effect, to *Francis Lutterell* for life; remainder to *Mary*, his intended wife, for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the said *Francis* and *Mary* in tail male; remainder to all and every the



the other son and sons of the body of the said *Mary* in tail male; remainder to *Katherine Tregonwell* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said *Katherine* in tail male; remainder to the daughter and daughters of the said *Mary* and *Francis* in tail; remainder to all other the daughter and daughters of the said *Mary* in tail; remainder to the daughter and daughters of the said *Katherine* in tail; remainder to the right heirs of the said *John Tregonwell* in fee. — And as to the other half thereof, after the death of the said *John Tregonwell*, to the use of the said *Katherine* for life; remainder to him, who should be her husband, at the time of her death, for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the use of the first and every other son of the body of the said *Katherine* in tail male; remainder to the said *Mary* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the body of the said *Mary* in tail male; remainder to the daughter and daughters of the said *Katherine* in tail; remainder to the daughter and daughters of the said *Mary* in tail; remainder to the right heirs of the said *John Tregonwell*. — And as to the 1600 acres of coppice, to the said *John Tregonwell* for life; remainder to *Jane* his wife, for her to receive 100*l.* per ann. for life; remainder as to one half thereof, if the said marriage should take effect, to the said *Francis Lutterell* for life; remainder to *Mary* for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the body of the said *Francis* and *Mary* in tail male; remainder to *Katherine Tregonwell* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said *Katherine* in tail male; remainder to the daughter and daughters of *Mary* and *Francis* in tail; remainder to all other the daughter and daughters of the said *Mary* in tail; remainder to the daughter and daughters of *Katherine* in tail; remainder to the right heirs of the said *John Tregonwell*; remainder, as to the other moiety, after the death of the said *John Tregonwell*, to *Katherine* for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the said



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*Katherine* in tail male; remainder to *Mary* for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said *Mary* in tail male; remainder to the daughter and daughters of *Katherine* in tail; remainder to the daughter and daughters of *Mary* and *Francis* in tail; remainder to all other the daughter and daughters of *Mary* in tail; remainder to the right heirs of the said *John Tregonwell*.

That a fine was levied, and a recovery suffered accordingly, to the uses in the said indenture mentioned.

That on the 10th of *December*, 1680, *Francis Lutterell* and *Mary Tregonwell* were married; and that he entered on such parts as were limited to him, immediately after the solemnization of the said marriage, and became seised thereof for life. That on the 10th of *January*, 1680, *Jane*, the wife of the said *John Tregonwell*, died, and on the 29th of the same month he also died; whereupon the said *Francis Lutterell* and *Katherine Tregonwell*, according to their several rights, entered into the respective parts of the premises which were, by the said indenture, limited to them respectively after the decease of the said *John Tregonwell* and *Jane* his wife, and were seised. That on the 11th of *August*, 1683, *Katherine* died an infant, unmarried and without issue; and thereupon the said *Francis* and *Mary* entered into such part of the premises, as were limited to the said *Katherine*, and became seised.

That *Mary* had issue one son, who died in the life-time of his mother, an infant without issue; and two daughters, *Mary* and *Frances*, and no other issue: That *Mary*, the eldest daughter, in the year 1700, married *Sir George Rook*, by whom she had *George Rook*, her only son; and that *Sir George* and his wife were dead.

That the said *Frances*, the youngest daughter, in 1705, married *Edward Ash*, Esq; and was still living.

That *Francis Lutterell*, on the 4th of *August*, 1690, died seised, leaving *Mary* his wife surviving; who, on the 5th of *August*, 1690, entered on the premises and became seised.

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That the said *Mary*, the widow, on the 1st of *January*, 1701, married *Sir Jacob Banks*, a *Swede*, and had issue by him two sons, *John* and *Jacob*, both born in *England*; and on the 11th of *March*, 1703, the said *Mary* died seised.

That on her death, *John Banks*, the eldest son, entered and was seised, pursuant to the said indenture, fine and recovery; and on the 27th of *March*, 1725, died without issue.

That all persons prior in the limitations of the said indenture to *Jacob Banks*, the brother of *John*, were dead before *John*; and all the terms were surrendered and extinguished before the death of *John Banks*: That on the 20th of *January*, 1724, *Sir Jacob Banks* died; and on the 28th of *March*, 1725, *Jacob*, the only brother of *John*, entered and was seised *ex parte materna*.

That the said *Jacob Banks* by indenture, dated the 11th of *June*, 1725, did bargain and sell the premises to *John Glass*, his heirs and assigns, to make him tenant of the freehold, that a common recovery might be had against him; which recovery was to be and enure to the use of the said *Jacob Banks*, his heirs and assigns.

That this indenture was duly inrolled within six months, and the recovery was suffered accordingly; that the premises in question were parcel of those comprised in the said recovery: And that afterwards, the said *Jacob Banks* was seised, and on the 27th of *February*, 1737, died seised without issue.

That *Thomas Tregonwell*, the youngest son of *John Tregonwell*, first above named, and only brother of *John Tregonwell*, who was eldest son and heir of the first named *John Tregonwell*, had issue *John* his son; that on the 20th of *May*, 1655, *Thomas Tregonwell* died; and *John*, his son and heir, had issue *John*, and died; and that *John*, the grandson of *Thomas*, had issue *Thomas Tregonwell*, the lessor of the plaintiff, and on the 1st of *June*, 1730, died, leaving him his son and heir.

That *Lawrence Bengston Banks*, an alien, had issue by *Christina* his wife, an alien, the before named *Sir Jacob Banks*, and three daughters, *Brita*, *Ingri* and *Anna Christina*; *Brita* married



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married one *Peter Bohmgreen*, an alien, and had issue by him four daughters; viz. *Maria Christina*, *Brita*, *Christina* and *Margaretta*, all aliens, and died leaving no other issue.

That *Ingri* was married and had issue, whose names were unknown to the jurors, all aliens, and died leaving such issue living in Sweden. That *Anna Christina* was dead, without issue. That *Maria Christina*, the eldest daughter, and *Brita*, the second daughter of *Brita* by *Peter Bohmgreen*, were both living; and that *Christina*, the third daughter of *Brita* by *Peter Bohmgreen*, had issue aliens, whose names were unknown to the jurors, and was dead. That *Margaretta*, the fourth daughter, married *John Strachan*, born an alien, and had issue the defendant *John Strachan*, their son, born in London the 17th of March, 1707; and that *Margaretta* died in February, 1726, leaving him her only son.

That *John Strachan*, the father of the said defendant, by an act of the 12 Will. III. was naturalized; and that the defendant was a natural born subject. — The verdict then concluded to the judgment of the Court.

This special verdict was twice argued in the Court of King's Bench, in Hilary term, 1742, and the Court being unanimous in their opinion, gave judgment for the defendants.

D. Ryder.

N. Gundry.

To reverse this judgment, a writ of error was brought in Parliament; and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued, that the rule of law is clear, that the estate of one dying seised by descent *ex parte materna*, can descend to none but the heir *ex parte materna*; it being founded on natural justice, that an estate should go to the blood and family from whence it came; where the owner himself has not thought fit to give it away from them. That this estate was originally the inheritance of *Jacob Banks's* mother and her ancestors; and therefore, if there had been no interruption in the course of descent, it must now descend to the plaintiff. That the only interruptions insisted on, were the settlement of 1680, and the recovery and deed of uses in 1725. As to the former, it was only a temporary interruption of the possession, by the particular or partial estates carved out of the

fee,



fee, the inheritance being still left to descend *ex parte materna*; and whenever those particular estates should determine, whether by the death of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again. And as to the latter, the recovery and deed of uses only determined and barred the particular estates, and consequently let the fee into possession in the same condition and quality as when in reversion; and therefore could not alter the nature of the antient use, or the descendible quality of it. That this is clearly the case where a fine is levied by tenant in tail, who has the reversion in fee in himself; it having been settled, that such a fine extinguishes the estate tail, and lets the old reversion into possession: Nor is there any material difference between a fine and recovery, for so far as their respective powers reach, they are both universally held to be bars of the particular estates, and conveyances of their own inheritance in fee.

It is objected, that a recovery not only bars the estate tail, but the remainders also. But that distinction is totally immaterial, because it affects only the extent of the bar or extinguishment, not the manner in which those instruments operate. It proves the recovery to be a bar or extinguishment of the estates tail, both in possession and remainder, but does not prove it to be less a bar or extinguishment of either; and the bar or extinguishment of both by the recovery, as much lets in the reversion in fee after both, as a bar or extinguishment by fine of one, lets in the reversion in fee dependent on that one only. That this distinction could not be applicable to the case of a recovery by tenant in tail, with an immediate reversion in fee in himself; and it would be extremely difficult to maintain, that in such a case, the use would be the old one, and go *ex parte materna*; but that in the present case it was a new one, only because there was an intermediate remainder in tail, which was equally, and but equally, barred with the estate tail in possession. Or, if that should be admitted to be no material point of distinction, it would be as hard to maintain, that if tenant in tail with reversion in fee in himself, descending *ex parte materna*, bars the estate tail by a fine, the resulting or declared use in fee to himself would be the antient use, and go *ex parte materna*;





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*materna*; but that if the same tenant in tail bars the same estate tail by a recovery, the resulting or declared use would be a new use, and go *ex parte paterna*. That it was apprehended, no case could be cited to warrant this distinction; and if not, reason and equity pointed out, that they ought both to have the same effect.

It is also objected, that a recovery is the proper conveyance of a tenant in tail with remainders over, and therefore operates as a grant from him; and that the recoveror comes in under him in the *per* as his grantee, and therefore as a purchaser. But this would be to make the recovery operate, not as a bar to the particular estates tail in possession and remainder, which is the sense and language of all the books; but as a bar to his own reversion in fee, which is absurd. Nor indeed is a recovery, in any other sense, a grant from the tenant in tail, than as it is a common assurance, by which he may bar those particular estates, and acquire or convey the fee simple in possession: But it is not less such an acquisition, if he gets it by barring the particular intermediate estates, and letting his own fee into possession, than if it could be said to be a grant of the estate tail itself to himself in fee. But whatever might be the case, where the estate tail in possession, together with the remainder or reversion in others, include the whole inheritance; yet where the tenant in tail in possession has also the reversion in fee, the recovery operates as a conveyance of the reversion, and a bar of the intermediate estates. A recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoveror come more under the tenant in tail, or his estate, or be more properly a grantee from him of his estate tail, than the conferee of a fine is under the confessor; and yet in this latter case, that notion clearly does not prevent the estate tail from merging in the fee.

It is however further objected, that the estate tail is continued and enlarged by the recovery: But this is at best a very inaccurate manner of speaking, if not unintelligible or absurd; since an estate tail cannot continue longer than the issue *per formam doni*, and a fee simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expressions



sions is, that the tenant in tail, by exercising the power which the law has given him of barring the estates tail, has become possessed of the absolute fee in possession; but in this sense it is no otherwise an enlargement of his estate, than a surrender of tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's estate; and is therefore more properly an enlargement of the fee simple by sinking the particular estate, than an enlargement of the particular estate which is absolutely destroyed. Nor does this manner of considering the recovery, in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate; because he acquires as much this way as the other, with this advantageous circumstance, that it keeps the estate in its natural channel; and prevents the act done for one purpose only, from enuring to another which the party never thought of, and which if he had, he might and probably would have avoided.

In support of the judgment it was contended, that *Jacob Banks* being tenant in tail under the settlement of 1680, by purchase and not descent, the rule of descent relied on by the plaintiff in error, was only applicable where the person, whose estate is in question, was at the time of his death seized by descent; and no way affected or influenced the present question, if *Jacob Banks* acquired the fee by suffering a recovery as tenant in tail by purchase. That a tenant in tail is considered in law as possible owner of the whole fee, viz. that the remainders and reversions are in his power by suffering a recovery, which is the act of tenant in tail, and takes its effect out of the estate tail, in right of which alone he is impowered to suffer such recovery; as he thereby acquires, in judgment of law, an absolute and pure fee against the remainder-men and reversioner, although the reversion were in a stranger: Whereas by a fine, the estate tail is only extinguished and barred as against the issue in tail, but as to the remainder-men or reversioner it subsists, notwithstanding that act, as a base, or determinable fee on failure of issue. It was therefore apprehended, that by the recovery, which removed all restraints and limitations ensuing or dependent after the estate tail; the fee so acquired by *Jacob Banks*, proceeded out of the estate tail, and took its effect to the use of the person so enabled in law to suffer the same, as the result of his power in virtue of the estate tail which was gained by settlement,



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tlement, *i. e.* by purchase; and consequently, the remainders and reversions, which subsisted before the recovery, were alike extinguished and put to an end by force and operation of such recovery. That if the estate tail, as to the issue only, is considered as barred by a recovery, and the old estate in fee or reversion, subject to the estate tail, is let in and takes place, as contended for by the plaintiff; the consequence and inconvenience thereof would be, that in that case every estate in the kingdom, of which a recovery is suffered by a tenant in tail, seised also of the reversion in fee, would still remain liable as assets by descent, to the specialty debts of the ancestor from whom it descended; (for the estate tail while it subsists, and the base fee gained by force of a fine, suspends the remedy so long as there is issue, and therefore preserves the debt) and this form of conveyance, invented and long used to strengthen the title of possessors who are tenants in tail, would be a means of destroying such intention, and would revive old demands to the ruin of many families.

JUDGMENT  
affirmed.  
Jour. vol. 26.  
p. 363. 368.

AFTER hearing counsel on this writ of error, the Judges (who attended according to order) were directed to deliver their opinions on the following question; *viz.* "Whether upon the death of *Jacob Banks*, the estate in question did by law descend to his heir on the part of the mother or not?" And the Judges having taken time to consider, the Lord Chief Justice of the Common Pleas delivered their reasons at large, and concluded with their opinions, "That the estate in question, upon the death of *Jacob Banks*, did not descend to his heirs on the part of the mother." Whereupon it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed, and the record remitted; and that the plaintiff in error should pay to the defendants in error, 10*l.* for their costs in the House.

Sir



Sir Richard Meade, Bart. - Appellant. Case 58.

Daniel Webb, Esq; - Respondent.

19th April, 1744.

THE appellant being seised in fee of the town and lands of *Kilcoleman*, and other lands in the barony of *Fermoy*, in the county of *Cork*, and intending to set the same for lives, or for years; some time in *June* or *July*, 1739, published an advertisement for that purpose, and that proposals would be received by himself at *Ballintober*, by the Reverend Dean *Meade* at *Dean's Court*, or by *John Meade*, Esq; at *Cork*.

The respondent, in consequence of such advertisement, some time in the said month of *July*, came to the appellant's house and proposed to take the said lands by lease; whereupon, the appellant told the respondent that the assizes of *Cork* were fixed for *August* following, and that he would then meet the respondent at *Cork* and treat with him about setting the said lands. And accordingly, at the said assizes, the respondent came to the appellant, and offered to give him 250*l.* per ann. rent for the said lands; which the appellant rejected, and then proposed to the respondent to set them by the acre, which he absolutely refused; insisting not to take them by the acre, but at a rent in gross. And having soon after proposed to give 260*l.* a year for the same; and the appellant being much solicited by the Dean and Mr. *John Meade*, on the respondent's behalf, at last agreed to set the said lands to the respondent for 41 years; to commence from the 25th of *March*, 1740, at the yearly rent of 260*l.* And upon the appellant's so agreeing to the respondent's proposal, the respondent insisted, that a lease or articles should be immediately drawn and executed, in pursuance of such agreement: But the appellant, being then in a great hurry of business, desired, that as the lease was not to commence till upwards of six months after, the execution of it, or the article might be postponed to some more proper opportunity, when it might be done with more deliberation; and the appellant assured the respondent that he would perform the said agreement. But the respondent not being satisfied with such assurance, and



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being very importunate to have something in writing under the appellant's hand, to shew for his bargain before he went home, instructions were given by the appellant and respondent to the said *John Meade*, to prepare a draft of a lease or articles pursuant to the said agreement. And he having prepared such draft, the same was delivered to the respondent, who immediately procured it to be engrossed; and a blank being left in the draft and engrossment for the number of acres, the respondent proposed that the same should be filled up with *one thousand*; to which the appellant made answer, the lands did not contain so many acres; but that he might put down what number of acres he pleased, for that he the appellant would not warrant the number of acres from 100 to 1000; and that whatever number should be mentioned, the words *more or less* should follow, for that he had not set the lands by the acre, but in gross:—Whereupon it was agreed, that the said blank should be filled up with the words *about nine hundred acres, be the same more or less* (the appellant telling the respondent he could not be certain as to the number of acres, not having his map about him,); and the blank being so filled up, the indenture purporting to be articles of agreement, or a demise of the premises for 41 years, to commence from the 25th of *March*, 1740, at the yearly rent of 260*l.* was duly executed by the appellant and respondent on the 21st of *August*, 1739.

The respondent, on the 25th of *March*, 1740, being the day of the commencement of the term, entered upon the premises, and continued in possession and received the profits thereof; and half a year's rent having afterwards become due and being in arrear, the appellant distrained for the same.

Whereupon, on the 19th of *January*, 1740, (a year and five months after the perfection of the articles, and ten months after his actual entry on and enjoyment of the lands) the respondent exhibited his bill in the Court of Exchequer in *Ireland*, against the appellant, and against the said *Dean Meade* and *John Meade*; and thereby suggested, that he had applied to the said *Dean Meade* and *John Meade* for a lease of the said lands, and was informed by them that they contained 960 or 970 acres; and that although the appellant had a map of the premises, whereby he knew the same contained less than 960 acres,

yet



yet that he did not contradict them, but assented to and affirmed the said representation, in order to deceive the respondent: That altho' he was well acquainted with the quality, yet he was ignorant of the quantity of the said lands; and took the said lease, upon confidence that the lands contained the number of acres so represented, and that he was defrauded in the agreement, and induced to take the same at a gross rent by such misrepresentation of the appellant, and of the said Dean *Meade* and *John Meade* the appellant's agents; and that 30 acres, part of the said lands, had been detained from him by persons claiming a title thereto; and that he had been hindered from the enjoyment of a turf, bog, or common, contiguous to the said lands, by the Lord Viscount *Doneraile*; who claimed an exclusive right thereto, and withheld 2000 kishes of turf, which had been cut and saved by the respondent on the said bog: And therefore prayed an injunction to stay the appellant's proceedings at law on account of the rent, and to be released from the said agreement, as being obtained on false and fraudulent suggestions.

On the 25th of *April*, 1741, the appellant put in his answer to this bill; and thereby set forth the several transactions and circumstances before mentioned, and denied he knew of any representation made of the number of acres by Dean *Meade*, or *John Meade*, or that they, or either of them, were his agents or agent, or had any power to treat for the setting the said lands; and denied he ever acquainted the respondent that the lands contained any certain number of acres; but admitted, that after the first application to him by the respondent for a lease, and before the second, when the agreement was concluded, a survey had been made and returned to him, whereby it appeared that the lands contained 874 acres, 2 roods, 13 perches; but denied he intended at the time of the agreement, to deceive the respondent by any knowledge he had of such survey, for that he offered as well before, as at the time of concluding the agreement, to set the lands at a rent by the acre, which the respondent refused; and declared, that he was as well acquainted with the lands as with his own, and proposed to take them at a gross rent: And the appellant by his answer offered, at his own expence, to support and defend the respondent's right and possession to every part of the demised premises, and insisted that  
the



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the agreement was fairly entered into, and that the respondent ought to perform the same.

The other defendants also put in their answers, and denied having represented the lands to the respondent, as containing any certain number of acres whatsoever.

On the 2d of *July*, 1741, the respondent amended his bill; and thereby set forth, that he was advised that the article executed by him ought, in a Court of Equity, to be looked upon as an agreement to be carried into execution with the usual clauses and covenants (if the representations made of the number of acres should not be considered as a fraud, so as to set aside the agreement); and that it was an usual clause, that a tenant might surrender on giving six months notice to the landlord of such his intent, and paying all rent and arrears: He therefore, by his bill, gave notice, that on the 25th of *March*, 1742, he would surrender and pay all rent and arrears due to that day, and waived all other allowances if such surrender was accepted; he also suggested, that there were 40 acres of common in the center of the lands, on which the tenants of the adjacent lands had an equal right of commonage with the tenants of *Kilcoleman*, and which the appellant, during the treaty, had concealed; and therefore the amended bill prayed, that if the appellant did not accept of the surrender offered, the respondent might be discharged from the said articles, and have an allowance for the acres which the lands fell short of the number represented, and for the common and detained acres and bog.

To which amended bill the appellant, on the 16th of *November* following, put in his answer; and thereby insisted, that the said lease or articles ought not to be considered in a Court of Equity as an agreement to be carried into execution, but as an actual demise of the lands; and that the clause of surrender mentioned in the bill was not an usual clause, and was never inserted except by particular agreement; he denied there was any such clause of surrender in any of his leases, or that any mention was made thereof during the treaty, and therefore refused to accept the surrender. He said he was informed, and believed, that there was a common adjoining to or belonging to the said lands, on which the tenants of the adjacent lands had



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an equal right of commonage; but whether such common was in the center of the lands, or what number of acres the same contained, he did not know; but denied he concealed any such right of commonage from the respondent, or that he knew or believed that the respondent took the said common as part of the said lands; and the appellant insisted on his right to the rent without any abatement whatsoever.

The cause being at issue, several witnesses were examined on both sides; and the appellant having examined the said Dean *Meade* and *John Meade*, they fully proved the several transactions relating to the said agreement, as before stated; and the cause was set down to be heard as against the appellant only.

On the 11th of *May*, and 6th of *June*, 1743, the cause was heard; and on the 5th of *July* following, it was ordered and decreed, that the said lease or agreement should be set aside, and that the lands should be forthwith surrendered; and that the respondent should account for what he made, or might have made, without wilful default, from the time he entered into the lands to the time of the surrender; and that an account should be taken of what had been paid on account of rent: And it was referred to the Chief Remembrancer, or his Deputy, to state the account accordingly.

From this decree the appellant appealed; insisting, that in making the agreement there was not the least surprise, fraud, misrepresentation, or concealment of any facts which the respondent required to be informed of; and that the number of acres was not inserted in the lease as matter of substance, it not being then in the appellant's power to ascertain the same, for want of his survey. But, the number of acres was apprehended to be altogether immaterial, because the appellant refused to ascertain the rent by that mode; but proceeded upon his own knowledge of the nature and quality of the land, and fixed the rent upon the gross value only; and the respondent was so far from desiring any further time for his information, that he was very pressing for the immediate execution of a lease, and which was unwillingly yielded to, merely to gratify him. That before the commencement of the term, the respondent surveyed the lands, and was thereby well apprised of the nature thereof,

D. Ryder.

W. Murray.



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thereof, and of the number of acres; and after such survey he entered into possession, and enjoyed the same for ten months before he filed his bill. That the Court ought not to have decreed upon any collateral evidence, contrary to the article in writing; the number of acres mentioned therein, being only by way of description of the land, and not as a measure for the rent. And that if the respondent was entitled to any decree at all, the most he could expect was to have had the lease rectified by an abatement of the rent, in proportion to the deficiency of the number of acres, and not to set the lease entirely aside. It was therefore hoped, that the decree would be reversed, the lease or agreement established, and the respondent's bill dismissed with costs.

J. Browne.

T. Clarke.

On behalf of the respondent it was argued, that in treaties for an agreement, a wilful and industrious concealment of the truth, in a material point, by one party, in order to keep the other in ignorance, and to profit by that ignorance, was a gross fraud, and ought in equity to set aside the contract; especially, where, as in the present case, such concealment is accompanied with misrepresentation, and a premeditated intention to deceive. That the agents of the appellant represented the quantity of land proposed to be demised, to be 100 acres more than it now appeared to be; and this representation being made in his presence, he, by not contradicting them, in effect confirmed the truth of what they said. That this was done before the execution of the agreement, and at a time when the appellant had caused a survey to be taken, which ascertained the exact limits and measure of the premises; and yet he did not think proper to undeceive the respondent, but purposely concealed the true measure and quantity from him, and for this remarkable reason, as stated in his answer, *because he did not think it prudent to disclose it*; which afforded a more convincing proof of a premeditated intention to deceive the respondent, than the testimony of many witnesses. That the garden and meadow-part of the premises which the appellant demised as his own property, were, when so demised, claimed and enjoyed by one Mr. *Fowkes* and his tenants; and the large tract of bog (a very material part of the premises, as it furnishes fuel to burn lime for manuring the land) had since been evicted and was enjoyed by Lord *Doneraile* and his tenants, and



a right of common on other part of the premises: That a privilege of grazing and cutting turf on part of the bog, and also a right of way or passage over part of the lands demised, were claimed and enjoyed by Mr. *Fowkes* and his tenants; and yet all these facts were industriously concealed from the respondent, who never discovered the same till after he took possession of the premises. Upon the whole, as the quantity of land comprised in the articles was not only less than it was represented to be, but even diminished by a subsequent eviction; as the possession and enjoyment of the residue was prejudiced by several rights, which were never discovered to the respondent till his taking possession; and as the tenants must be perpetually exposed to disputes and controversies in maintaining the possession; the respondent could not be said to have the thing he agreed for, but something so different both in quantity and value, as if represented in its true light, and with all its circumstances, would have prevented the respondent from being ensnared into the articles by the concealment and misrepresentation of the appellant; and from which, in a Court of Equity, the respondent ought on that account to be delivered.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that in the said decree, after the words ["set aside"] these words should be inserted ["and that the respondent do execute a surrender of the said agreement or lease, to the appellant; and that such surrender be settled by one of the Barons of the said Court of Exchequer in Ireland, in case the parties differ about the same;"] that after the words ["account with the said Sir *Richard Meade* for"] these words ["what he made, or might have made without his wilful default"] should be left out, and instead thereof these words ["the rent of the said lands and premises after the rate of 260*l.* per ann. with such deductions as are herein after mentioned"] should be inserted; and that after the words ["to the time of the surrender thereof"] these words should be inserted ["and in case the respondent shall have surrendered and yielded up to the appellant the possession of the said lands, at any time, not being one of the half-yearly days whereon the said rent is by the said agreement or lease reserved to be paid, then the said account of the rent of  
" 260*l.*

DECREE affirmed. with variations, Jour. vol. 26. p. 371.







*Thomas*. — That Earl *Thomas* the grantee, died seised, whereby the premisses in question descended to his grandson *Thomas* Earl of *Derby*. — That this Earl *Thomas* entered and was seised of the premisses in question, and in *Hilary* term, 5 *Hen. VIII.* suffered a common recovery; wherein *James*, Bishop of *Ely*, *Hugh*, Bishop of *Sodor* and *Man*, and other great persons were demandants, and the said *Thomas*, Earl of *Derby*, tenant; who vouched to warranty one *Thomas Fish*, the common vouchee; and that such proceedings were thereupon had, that judgment was given, that the said Bishop of *Ely* and others the demandants, should recover their seisin of the premisses in question against the said *Thomas*, Earl of *Derby*, the grandson; and that the said *Thomas*, Earl of *Derby*, the grandson, should have of the lands of the said *Thomas Fish*, of the value, &c. and that the said *Thomas Fish* should be amerced. — That after the said common recovery, Earl *Thomas* the grandson, entered into the premisses, and was seised thereof as the law requires; and had issue male of his body *Edward*, his eldest son, and afterwards died so seised; whereby the premisses descended to his said son *Edward*, then Earl of *Derby*, who entered and was seised thereof as the law requires. — That the premisses in question descended from him in a lineal descent to *Ferdinand*, Earl of *Derby*, who entered and was seised, and died so seised without any issue male of his body, in the life-time of his brother *William*; but that he left three daughters, *Ann*, *Frances* and *Elizabeth*.

The jury further found, that divers disputes and differences arising between Earl *William* and the daughters of his brother *Ferdinand*, concerning the estates of the family; to compose those differences, an act of Parliament was made, 4 *Jac. I.* by which, *inter alia*, it was enacted, That Earl *William*, for his life, and after his death *James*, his son and heir apparent, and the heirs male of his body; and in default of such issue, the second, third, fourth, fifth, sixth and seventh sons of Earl *William*, and the respective heirs male of their respective bodies successively; and in default of such issue, Sir *Edward Stanley*, during his life, and after his decease, his first, second, third, fourth, fifth, sixth and seventh sons, and the heirs male of their respective bodies successively; and in default



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of such issue, *Edward Stanley* of *Bickerstaff* during his life; and after his decease, his first, second, third, fourth, fifth, sixth and seventh sons, and the heirs male of their respective bodies successively, should and might from thenceforth hold and enjoy the premises in question. — That in this act, there was contained a power for *Earl William*, *Sir Edward Stanley* and *Edward Stanley* respectively, after they should be in the actual possession of the estates to them limited, to make jointures for their respective wives, or eldest sons wives: and also a proviso, which saved all rights, interests, reversions, &c. to the Crown, in the same manner and form, and to all intents and purposes, as if that act had never been made. — That the premises in question, were parcel of the estates by the said act settled. — That after the death of *Earl William* and *James* his son, the premises in question descended to *Earl Charles*, grandson of *Earl William*. — That *Earl Charles*, in consideration of 131*l.* 19*s.* by feoffment, and bargain and sale inrolled, both bearing date the 20th of *January*, 1653, and by fine with proclamations, levied in *Michaelmas* term, 1654, conveyed the premises to *John Leybourn* in fee, who entered and was seised; and under whom the plaintiff in error claimed title. — That *Earl James* the son, and *Earl Charles* the grandson of *Earl William*, died without issue male. — That *Sir Edward Stanley*, in the said act of Parliament mentioned, was also dead without issue. — That *Edward*, Earl of *Derby*, the lessor of the plaintiff in ejectment, was heir male of the body of *Edward Stanley* of *Bickerstaff*, also mentioned in the said act; and by the death of *James*, Earl of *Derby*, in the year 1735, became and was heir male of the first named *Thomas*, Earl of *Derby*, the grantee of the Crown. — That *Earl Edward*, on the 17th of *January*, 1738, made an actual entry into the premises in question, claiming the same as his estate and freehold; and afterwards, on the 19th of the same month, demised the same to the said *George Lewis*, who entered and was possessed thereof: And upon these facts, the jury submitted the matters of law to the judgment of the Court.

Upon the trial of this cause, the recovery suffered 5 *Hen. VIII.* was given in evidence, and no objection was then made to it; as the only doubt which occasioned the finding of the special verdict



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verdict was, whether the entry of the defendant in error was lawful or not; and this depended upon the general question, whether, notwithstanding the recovery, the feoffment and fine of Earl Charles in 1653, who then sold the estate to the plaintiff's ancestor, made a discontinuance or not: For if it did, the entry of the defendant in error was taken away.

On his behalf it was insisted, that the feoffment and fine in 1653, did not discontinue his remainder; for that the reversion of the estate being ultimately in the Crown, protected it from such discontinuance. — But to this it was answered, that it did not; because a reversion in the Crown, to prevent a discontinuance, must be a reversion immediately dependent on the estate tail attempted to be discontinued, which this was not; for by the recovery, 5 *Hen. VIII.* the old estate tail was barred, and turned into a fee simple, descendible to Earl Thomas and his heirs general, as long as there were heirs male of the said Earl subsisting; and the reversion thereby left in the Crown, became only a mere possibility of reverter, after the determination of such qualified fee; and of consequence, not within the protection of 34 *Hen. VIII.* which extended only to estates tail then subsisting, which this was not: For that statute only says, that no feigned recovery *hereafter* to be had against tenant in tail of lands, whereof the reversion or remainder *at the time* of such recovery had, shall be in the King, shall bind, &c.

And as to the estate tail created by the settlement which was confirmed by the act 4 *James I.* it was only a partial estate tail, created out of the fee simple gained by the recovery; and the reversion being left in the Crown by that act, in the same plight it was before, it was in no sort dependent upon, or connected with the estate tail then created; but left to depend, as it did before, on the fee simple gained by the recovery; and which might possibly subsist many generations, after all the estates tail created by that act were spent: And therefore, the fine and feoffment in 1653, made a discontinuance of the remainder limited to the defendant in error; as they could not, nor did, in any manner affect the reversion of the Crown, between whom and the remainder in tail, there was no privity or dependence. — But upon this point, tho' argued three several times, the Court gave no opinion.

For,



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For, upon arguing the case, the counsel for the defendant in error started a new objection ; namely, that no writ of execution or entry of the recoverors, appeared upon the special verdict ; and as it was not found, it could not be presumed ; the recovery therefore was not good, and of consequence the Earl's entry was lawful : And the Court being of that opinion, gave judgment for the Earl upon that point only.

R. Crowle.

B. Crafter.

But to reverse this judgment, the present writ of error was brought ; and on behalf of the plaintiff in error it was insisted, that the judgment was erroneous, and that the writ of execution, though not expressly found, ought to have been presumed from the exemplification of the recovery itself, as found ; its antiquity of above 230 years ; its being entered upon the rolls ; the dignity and quality of the parties to it ; and a fresh entry of Earl *Thomas*, expressly found to be made after such recovery ; and likewise from the impossibility of any other proof of *actual* execution. For it is well known, that amongst the rolls of the recoveries of that and the preceding reigns, the award of the writ of execution is not entered or indorsed upon one in twenty of them, as has been usual of later years ; and upon search in the proper offices, where the writs of execution themselves, of recoveries in those early times, ought to be filed ; not one of such ancient writs is to be met with. That if any objection had been made to the recovery on this account, at the time of the trial, the Court would and ought to have directed the jury to find the execution of it, from the antiquity of the exemplification itself ; and the possession of the defendant and his ancestors agreeable to it : And if so, it was difficult to give a reason, why the Courts of Law should not draw the same legal conclusions ; and make the like reasonable implication from facts themselves, which they would direct a jury upon their oaths to do. That the execution of this recovery ought further to be presumed, from the sale by Earl *Charles* in 1653, and the acquiescence of his two sons, Earl *William* and Earl *James* successively, for near fourscore years together ; and from the fatal consequences which might attend this judgment : For if this doctrine should be established, that the Judges ought not to presume execution at this distance of time, it might shake the titles to great part of the property in this kingdom, which



which probably may depend on the validity of ancient recoveries, suffered before the statute of 34 Hen. VIII. And if a jury, for any reasons peculiar to themselves, should think proper to insist upon evidence to support such ancient recoveries, which, for the above reasons, appears impossible to be laid before them; all property might be subjected to an arbitrary, and perhaps corrupt determination of a jury, without any redress whatever; as no attain, or other remedy against them, would in such case lie. That the presumption now contended for, was further aided by the length of possession, transmitted from ancestor to heir, and so expressly found by the jury, in a series of quiet, peaceable and uninterrupted enjoyment for the compass of near 100 years together.

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But admitting that the Court of King's Bench ought not, in strictness of law, to have presumed the writ of execution, as the jury had not expressly found it; yet it was apprehended to be at most but an imperfect verdict, and that therefore no judgment should have been given thereon; but a *venire facias de novo*, i. e. a new trial, ought to have been awarded; but which the Court, on motion, refused. — The objections to this motion were, that a *venire facias de novo* is only grantable, where the verdict is so imperfect, that the Court cannot give a compleat judgment upon it; or where the jury are guilty of misbehaviour, in not finding according to their duty: And it was apprehended, that both these reasons concurred in the present case. For 1st, If it was the office of the jury to have found the fact of execution one way or the other, and not to have submitted that question to the Court, because the Court cannot legally presume either way; they misbehaved in not doing part of their duty, and therefore the record, in this particular, should have been sent back to them. And 2dly, If compleat justice could not be done to the parties upon this record, no compleat judgment could be given upon it; and the whole merits of this case depending upon the question, whether execution was awarded or not; as the jury had not, with certainty, found either way, but submitted it as a question to the Court; and admitting that the Court could not, in strictness of law, presume there was execution, with what justice could they determine there was not? When it must be undoubtedly admitted,



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that the reasonable presumption lay the other way. It was therefore hoped, that these reasons would be found to conclude strongly in favour of a new trial, to ascertain this fact one way or the other; and that therefore the judgment of the Court of King's Bench would be reversed.

T. Bootle.

W. Wynne.

1 Co. Shelley's case.  
Moor 141.

Sir William Jones, 10.

On the other side it was contended, that the judgment was right, and ought to be affirmed; because it did not appear, that any writ of seisin was ever awarded upon this common recovery; or that the same was ever carried into execution by writ of seisin, or otherwise: For until a writ of seisin is awarded, executed and returned (all which must appear upon record, and cannot be presumed) it is not a perfect recovery, and operates nothing; nor is any new estate gained to the recoveror, or any use raised thereby, or the former estate altered or changed: And so it was determined on a question upon this very recovery, so long ago as in the reign of King James I. The consequence is, that Earl Thomas, notwithstanding this recovery, still continued tenant in tail, and the reversion remained in the Crown, undisturbed or altered. Upon this, the Court of King's Bench principally founded their judgment; and supposing that judgment right upon this point, the rest of the points insisted on by the plaintiff in error, were apprehended to be immaterial.

1 Inst. 335.  
372.

But supposing this recovery had been carried into execution, it could not bar, discontinue, or alter the reversion in the Crown; but that reversion continued just the same, as if no such recovery had been suffered. For it is a rule in law established beyond doubt, that a recovery suffered either before or since the statute 34 Hen. VIII. cannot bar, discontinue or alter a reversion in the Crown. And this being so, then whether the recovery had, or had not, any effect upon the estate tail, from the time of suffering it to the 4th of James I. was quite immaterial to the present question; because by the act then passed, the estate was entailed upon the heirs male of this noble family, with a remainder over to the sons of Edward Stanley of Bickerstaff, the ancestor of the defendant in error, in tail male: And it has been determined, that this very act was no more than a legislative settlement of the estate, according to the agreement of



of the parties ; and deriving the several limitations out of the old estate tail, but still leaving the reversion in the Crown. Besides it is plain, that at the time of making that act, the old estate tail under the grant of *Hen. VII.* was understood to be still subsisting ; because, upon the death of Earl *Ferdinand* without issue male, the estate came to *William*, his younger brother ; whereas if there had been any ground to say, that a qualified fee was gained by the recovery of 5 *Hen. VIII.* the daughters of Earl *Ferdinand* would have been entitled. Taking it that Earl *Charles*, who made the feoffment in 1653, and levied the fine in 1654, was only tenant in tail under the settlement made by the act, with the reversion in the Crown ; then that feoffment and fine could be no discontinuance, or bar to the title of the defendant in error ; because the estate then in Earl *Charles* being of the gift of the Crown, and the reversion still in the Crown, it could not be barred or discontinued by fine or feoffment, being within the protection of the statute 34 *Hen. VIII.* cap. 20. And this was also determined upon the construction of this very act of Parliament, upon a fine levied by Earl *Charles* of another part of the estate thereby settled, and entailed in the same manner as the estate in question.

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1 Inst. 372. b.

Raym. 338.  
Sir Thomas  
Jones, 237.

But supposing this estate not under the protection of the statute 34 *Hen. VIII.* yet, as the defendant in error claimed in remainder, as heir male of the eldest son of *Edward Stanley* of *Bickerstaff*, after failure of issue male of Earl *Charles*, who levied the fine, and not through him ; the fine or feoffment could be no bar or discontinuance of his estate, which he so claimed in remainder, or take away his entry ; his title not accruing till the death of the last Earl *James*, who did not die till the year 1735, and consequently he was well entitled to the premises in question.

AFTER hearing counsel on this writ of error, the two following questions were put to the Judges ; viz. " I. Whether sufficient matter is found in the special verdict, whereupon the common recovery of *Trinity* term, 5 *Hen. VIII.* can be adjudged or taken to be a compleat valid recovery ? II. If not, whether by law, a *venire facias de novo* ought to be awarded in this case ?" And the Lord Chief Justice of the Common Pleas having delivered the unanimous opinion of the Judges upon

JUDGMENT  
affirmed.  
Jour. vol. 26.  
p. 373. 377.



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upon both questions in the negative, and given their reasons at large; it was thereupon ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed, and the record remitted: And it was further ORDERED, that the plaintiff in error should pay to the defendant in error, 10*l.* for his costs in the House.

Case 60. *Cordelia Pendred*, Widow, *Morley Pendred*, her eldest Son, an Infant, and *John Hawkshaw*, } Appellants.  
*James Carroll Griffith*, Esq; and *Abdiel Edwards*, } Respondents.

1st May, 1744.

SIR *Maurice Eustace*, being mortgagee in possession of the lordship of *Baltinglass*, in the county of *Wicklow*, took upon him to make leases of the estate; and by indenture, dated the 24th of *April*, 1683, he demised the lands of *Ballynure*, part of the said lordship, containing by estimation 1004 acres, to *Joseph Parrott* and his heirs, for the lives of *Peter Parrott*, his son, and *Joshua Parrott* and *Thomas Litchfield*, two of his grandsons, at the yearly rent of 150*l.* with a clause of renewal for ever, upon the determination of any and every life then and thereafter to be inserted at the nomination of the lessee, upon payment of 100*l.* as a fine for each life so to be inserted: And it was thereby provided, that if such nomination and payment was not made, from time to time, within the space of six months after the death of any and every of the said persons; then it should and might be lawful to and for the said Sir *Maurice Eustace*, his heirs and assigns, into the said demised premises to re-enter; and the same to have again, repossess and enjoy, as in his and their former estate.

*James Carroll*, Esq; the respondent *James's* grandfather, having a right to the equity of redemption of the premises, in *Trinity* term, 1683, preferred his bill in the Court of Chancery

in



in *Ireland*, against Sir *Maurice Eustace* for a redemption, which was accordingly decreed; but the lease to *Parrott* was confirmed. And this decree was on the 21st of *March*, 1699, affirmed, upon an appeal to the House of Lords.

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Vide Jour.  
vol. 16. p. 555.

*Joseph Parrott*, the original lessee, let out several parcels of the land to under-tenants for the same lives, but at an advanced rent; particularly, he demised one parcel, containing about 600 acres, to *Richard Clarke*, at a rent of 100*l.* per ann. and a fine of 56*l.* upon the renewal of every life: He afterwards, by lease and release, dated the 1st and 2d of *July*, 1709, mortgaged his lease for 100*l.* to *Morley Saunders*, Esq; Doctor of Laws, then Prime Serjeant, and father of the appellant *Cordelia Pendred*; and in the same year, he conveyed his equity of redemption to Dr. *Saunders*, for 332*l.* reserving to himself 20 acres, which he was to hold of Dr. *Saunders* at the rent of a pepper-corn; and which also was afterwards purchased from him by Dr. *Saunders*, who likewise bought in the several interests of *Joseph Parrott*'s lessees, except that of *Richard Clarke*.

The right of *James Carroll* to the estate, subject to *Parrott*'s lease, being settled by the decree of the Court of Chancery and the judgment of the House of Lords; and *Parrott*'s interest being vested in Dr. *Saunders*, by the several assignments above mentioned; and *Peter Parrott*, a *cestui que vie* in the lease, being dead; *James Carroll*, by indenture, dated the 1st of *November*, 1710, reciting the former lease, in consideration of 165*l.* being the fine payable by the former lease, and the interest thereof since the death of the *cestui que vie*, demised the said lands of *Ballynure* to *Elias Crips*, in trust for Dr. *Saunders*, for the lives of *Joshua Parrott* and *Thomas Litchfield*, the two surviving lives in the former lease, and of *Richard Clarke*; reserving the same rents and accates, and with the same covenants as were contained in the former lease. And Dr. *Saunders*, by indenture, dated the 14th of *December*, 1711, renewed the lease to the said *Richard Clarke* for the same lives, and described in the same manner, at the rent of 100*l.* and a fine of 56*l.*

*James Carroll*, in *April*, 1711, made a mortgage of his estate to Dr. *Duncan Cuming* in fee, for 700*l.* And by his will, dated



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the 28th of *November*, 1711, he devised all his estate in the said lands, to the said Dr. *Duncan Cuming* and *Caleb Thomas*, in trust for the issue male or female of his own body, if he should leave any; and for want of such issue, then to the use of his grandson the respondent *James Carroll Griffith*, and the heirs of his body: And in 1712, the testator died without issue, and without altering or revoking his will; whereby the estate subject to the said mortgage, vested in the respondent *Griffith*, who was then an infant of about five years old, and did not attain his full age till the year 1728.

During all this time, Dr. *Saunders* never applied for the renewal of his lease; pretending he was not informed, nor ever enquired whether *Joshua Parrott* and *Thomas Litchfield*, the *cestui que vies* in the original lease, were living or dead; and yet in this interval he renewed the leases of his under-tenants, and took fines upon inserting new lives, which he alledged was done rather to oblige the tenants, than because it was any way necessary. Accordingly, on the 30th of *September*, 1727, he renewed the lease to *Richard Clarke*, for the following lives; viz. the life of *Joshua Parrott* (describing him by the name of *Joshua Parrott* son of *Joshua Parrott*, late of *Ballynure*) the life of *John Winnett*, (whose name was inserted in the place of *Thomas Litchfield*, and for which a fine of 56*l.* was paid) and the life of the said *Richard Clarke*.

There was one *Joshua Parrott*, then living in the neighbourhood of the estate, who was the son of *Joshua Parrott*, the real *cestui que vie* in the original lease and grandson of *Joseph Parrott* the first lessee: But no reason could be assigned why the description of the *cestui que vie* in the original lease, who was therein called *Joshua* the grandson of *Joseph*, should be varied in the renewed lease, and he should be therein stiled *Joshua*, the son of *Joshua Parrott*; unless it was done with a view, that from the identity of the name of both these persons, and of their fathers and family, and place of abode; (in which description both of them exactly agreed,) and by leaving out of this and all future renewals, the distinction of his being the grandson of *Joseph*, (which was the circumstance in which they differed) a reputation and belief might be gained amongst the under-tenants and neighbourhood, that *Joshua Parrott*, men-  
tioned



tioned in the renewed leases, was the real and original *cestui que vie*; and that the respondent *Griffith*, who was then an infant, and his trustees, who were entire strangers to all the transactions relating to the original or renewed leases, might afterwards be imposed upon, and induced to believe the same thing: And accordingly, in all the leases afterwards made of that part of the estate, either by *Dr. Saunders*, or by *Richard Clarke*, *Joshua Parrott* was always described as the son of *Joshua Parrott*, and not as the grandson of *Joseph Parrott*.

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The respondent *Griffith* attained his age in 1728; and soon after paid off *Dr. Cuming's* mortgage, and had it assigned to the respondent *Edwards* in trust for him.

*Richard Clarke*, one of the *cestui que vies* in *Dr. Saunders's* lease, and a lessee of part of the premises under *Dr. Saunders*, died on the 29th of *January*, 1729; having made his will, whereby he devised his interest in the premises to his nephew *George Alcock*; who, being thereby entitled to *Mr. Clarke's* lease, applied to *Dr. Saunders* for a renewal; and accordingly, on the 7th of *April*, 1730, *Dr. Saunders* received a fine of 56*l.* and granted a new lease for the lives of *Joshua Parrott* the son of *Joshua Parrott*, *John Winnett*, and the said *George Alcock*, whose life was inserted in the place of the deceased *Richard Clarke*.

Although *Dr. Saunders* renewed the lease and received the fine of his under-tenant *Alcock*, in about two months after the death of *Clarke* the *cestui que vie*; yet it was near three years before he applied to the respondent *Griffith* for a renewal, or gave him any notice of *Clarke's* death.

But on the 19th of *February*, 1732, he wrote a letter, informing him that *Mr. Clarke* was dead, and desiring a meeting to be appointed for renewing the lease and paying the fine; and in his letter, named *George Alcock* as the life to be substituted in the place of *Mr. Clarke*. Upon the receipt of this letter, the respondent went with *Mr. Anderson* his Attorney, to *Dr. Saunders's* house in *Dublin*; when he proposed to renew the lease and pay the fine, for inserting the name of *George Alcock* in the place of *Richard Clarke*, and offered a banker's note as a tender of the money; and the respondent enquiring how



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how long *Clarke* had been dead, Dr. *Saunders* answered, that *Clarke* had been dead about 12 or 13 months; but that he was willing to pay interest for the fine, from the time the lease ought to have been renewed: And upon further discourse, the respondent, or his agent, mentioned that they had some information that *Joshua Parrott*, the *cestui que vie* in the original lease, was dead; and having enquired whether *Thomas Litchfield* the other *cestui que vie* was living or not, Dr. *Saunders* declared, that the said *Parrott* was still living, and said he was a poor old man; and that about three weeks or a month before, he had seen him and given him a piece of money; he also affirmed, that *Thomas Litchfield* was alive, and was at that time in the country; and the Doctor then insisting upon the tender which he had made, or that the respondent should go to the banker's, who would pay down the money; the respondent and his agent, trusting to the Doctor's affirmation, that *Clarke* had been dead no more than 12 or 13 months, and that *Thomas Litchfield* and *Joshua Parrott* were both living; declared they would admit the bank note as a sufficient tender, and would not take advantage of the lapse of time since the decease of *Clarke*, provided Dr. *Saunders* made it appear that *Parrott* and *Litchfield*, the other *cestui que vies*, were still living; but Dr. *Saunders* pretending he was soon to go out of town, and that his Attorney was at that time in the country, it was agreed to put off the farther consideration of the affair to the next *Easter* term.

During this interval, the respondent found that *Richard Clarke* had been dead about three years, and that Dr. *Saunders* had renewed the lease to *Clarke*'s executor, near three years before their last meeting. This manifest attempt to impose upon the respondent, put him upon a more strict enquiry after the other lives, and at last he discovered, that *Joshua Parrott*, who passed in the neighbourhood for the *cestui que vie* in the lease, and to whom Dr. *Saunders* pretended he had given a piece of money, was great grandson, and not the grandson of *Joseph Parrott* named in the leases of 1683, and 1710, and was at the time of this enquiry about thirty years old: He also found that *Joshua Parrott*, the grandson of *Joseph*, and *Thomas Litchfield*, the two real *cestui que vies*, had been soldiers in the service of Queen *Anne*; and that it was the general reputation, that the  
said



said *Joshua Parrott* was killed at the siege of *Mercia* in the year 1705, or 1706, and was never heard of afterwards; and that *Thomas Litchfield* had died on shipboard in his voyage from the siege of *Barcelona*, in or about the same year; and that his widow had been married above twenty years to a second husband: Upon these discoveries it appearing, that *Dr. Saunders* had been guilty of great misrepresentation and concealment of the truth, with a design to impose upon the respondent; he declined all further meetings, and gave him to understand that he should not renew the lease, which he insisted was absolutely determined upon the death of *Richard Clarke*.

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*Dr. Saunders* therefore, in *Trinity* term, 1733, filed a bill in the Court of Exchequer in *Ireland*, against the respondent and *Francis Anderson* his Attorney, who attended at the meeting above mentioned, and against the representatives of *Dr. Duncan Cuming*, the mortgagee, who died sometime before; and set forth, that he had been informed in the year 1732, of the death of *Richard Clarke*, and had on the 19th of *February*, 1732, informed the respondent thereof, and tendered a fine to him, for inserting the name of *George Alcock* in the room of *Richard Clarke*; that the respondent had promised to renew the lease, upon receiving the fine with interest from six months after the death of *Richard Clarke*, which he stated by his bill to have happened about *January*, 1731; and he also suggested, that *Joshua Parrott* and *Thomas Litchfield*, the two lives mentioned in the leases of 1683, and 1710, were still living; but as they had been a great number of years out of the kingdom and not heard of, he was willing to admit them to be dead, and to submit to pay fines for these lives, and to pay a fine for every seven years for each life respectively, from the time that these persons were respectively reputed dead, with interest for each respective fine, from the time that it ought to have been paid; and therefore prayed, that the respondent might be compelled to renew the lease for the lives of *George Alcock*, *James Carthy* and *John Winnett*, with the reservations and provisions contained in the original lease.

The respondent, in the same term, brought an ejectment for the lands on a double demise; viz. of himself and the respondent *Edwards*, as the assignee of *Dr. Cuming's* mortgage.



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On the 26th of *May*, 1733, the respondent put in his answer to Dr. *Saunders's* bill, and admitted the application made to him in *February*, 1732, for a renewal and the tender of a fine; and set forth the conversation had with Dr. *Saunders* on that occasion, in the manner above mentioned; and admitted the promise not to take advantage of the lapse of time since *Clarke's* decease, under the proviso and restrictions before stated; but he relied on the legal determination of the lease, and insisted on Dr. *Saunders's* misrepresentation of the time of *Clarke's* death, his concealing the death of *Litchfield* and *Parrott*, and his varying the description of *Joshua Parrott* in the lease to his under-tenants, so as to make it tally with a person then in being, and thereby induce a belief of his being the original *cestui que vie*, as so many fraudulent acts; and for which reasons, he ought not to have any assistance or relief in a Court of Equity.

Dr. *Saunders* afterwards amended his bill, setting forth the proceedings on the ejectment, and making the respondent *Edwards* a party, and praying an injunction; which the Court granted till the hearing of the cause, on his paying the rent and arrears then due, and on his entering into a recognizance to be accountable for the mesne profits of the lands from the death of *Richard Clarke*, subject to the further order of the Court.

The respondent *Carroll* put in his answer to the amended bill; and in *Easter* term, 1734, filed a cross bill against Dr. *Saunders* and his under-lessees, the tenants of the land; wherein he set forth the death of all the *cestui que vies* in Dr. *Saunders's* lease, and charged the several fraudulent practices abovementioned, to conceal or misrepresent the time of their deaths; and prayed, that the defendant *Saunders* might account for the rent and arrears to the death of *Richard Clarke*, and for the mesne profits from that time, or for what he might have made thereof without his wilful default.

Dr. *Saunders* put in an answer to this bill; and admitted, that he had renewed the lease to *Richard Clarke* in 1727, and had received a fine for inserting the name of *John Winnett* in the place of *Thomas Litchfield*; and yet pretended, he had no reason



reason to believe that *Thomas Litchfield* was dead: He also admitted, that he might have said at the meeting with the respondent *Caroll* and his agent in *February*, 1732, that *Thomas Litchfield* was alive and in the country; but said he knew nothing of him, or where to enquire about him: He admitted that *Joshua Parrott* the son of *Joshua Parrott*, was named as a *cestui que vie* in the leases which he made to *Richard Clarke* and *George Alcock*; but pretended, it was by the mistake of the Clerk who ingrossed the deed, and not with any fraudulent view: He also admitted, that he told the respondent at the meeting in *February*, 1732, that *Joshua Parrott*, the original *cestui que vie*, was alive, and lived in the neighbourhood of the estate; that he had lately seen him and given him a piece of money, and that he was a poor old man: But said, that he afterwards found himself mistaken, and that the person he meant was not the *cestui que vie*; and that he seemed to him to be a middle aged man, or somewhat advanced in years.

Issue being joined in both causes, and several witnesses examined in the original cause, and publication passed, both causes came on to be heard together, on the 8th, 10th, and 11th of *November*, 1736; when it was ordered and decreed, that the original bill of *Dr. Morley Saunders* should be dismissed with costs, and that the injunction should be dissolved; and that the cross bill should be retained, until after a trial at law should be had on the ejectment brought by the respondent for the recovery of the premises: And the respondent was thereby at liberty to inrol the said decree with costs; which was accordingly done.

On the 5th of *April*, 1737, and before a trial could be had on the ejectment, *Dr. Saunders* died; leaving the appellant *Cordelia*, then the wife of *George Pendred*, Esq; his only issue and heir at law; but before his death he made his will, dated the 4th of *April*, 1737, and thereby devised the residue of all his real and personal estate (except some particular estates not comprised in the said leases, which were by the will devised to *Frances* his wife, for her jointure) to the appellant *John Hawkshaw*, *Isaac Dobson*, Esq; and *Thomas Medlicott*, Gent. and their heirs, in trust for the payment of his debts; and then in trust, to permit the appellant *Cordelia*, to receive the profits



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profits to her separate use during her life; and after her death, in trust for the appellant *Morley Pendred*, eldest son of the appellant *Cordelia*, and the heirs of his body, with several remainders over; and appointed the said *John Hawkshaw*, *Frances Saunders* and *Thomas Medlicott*, executors of his will; who proved the same, and took upon them the execution of the trust.

The ejectment brought by the respondent in 1733, having abated by the death of Dr. *Saunders*, the respondent, as of *Easter* term, 1737, brought a new ejectment in the name of *Samuel Cooke*, lessee of both the respondents; to which the said *Medlicott* and the appellant *Hawkshaw*, made their defence; and the same having been tried at *Wicklow*, at the Summer Assizes, 1737, and the said *Medlicott* and the appellant *Hawkshaw* not offering any evidence whatsoever to shew that any of the lives were in being, the respondent *Griffith* obtained a verdict; but by mistake in the declaration, as to the time of laying the demise, he got a verdict only for three-fourths of the said lands; the demise being laid before one of the coheirs of Dr. *Cuming*, had assigned to the respondent *Edwards*: And the respondent having obtained judgment on this verdict, *Medlicott* and the appellant *Hawkshaw* brought a writ of error in the Exchequer Chamber to stay execution.

The respondent, therefore, in *Easter* term, 1738, brought a new ejectment on his own demise for the whole lands, to which *Medlicott* and the appellant *Hawkshaw* made defence; and the respondent obtained a verdict at the then next Assizes, and in *Michaelmas* term following entered up judgment thereon; whereupon *Medlicott* and the appellant *Hawkshaw* brought another writ of error, which they afterwards withdrew; so that the respondent was, by *habere facias possessionem*, put into possession of the premises on the 2d of *April*, 1739.

The cross cause having been duly revived, came on to be heard upon the 8th of *June*, 1741; when it was decreed, that it should be referred to the Chief Remembrancer, or his Deputy, to state an account between the respondent and the executors of Dr. *Saunders*, of the rents, accates and duties of the premises, according to the rent reserved by the lease made by *James Car-*



roll to the said Dr. *Saunders*, until the death of the said *Richard Clarke*; and it was also ordered, that the said *Thomas Medlicott*, *Frances Saunders* and the appellant *Hawkshaw*, executors of Dr. *Saunders*, should account with the respondent for what they or their testator made or might have made, without his or their wilful default, out of the premises, from the death of *Richard Clarke*, till the respondent was put in possession.

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From these decrees the present appeal was brought; and on behalf of the appellants it was insisted, that no proof had been made of any fraud or designed misrepresentation in Dr. *Saunders*; or that he had any notice of the deaths either of *Parrott* or *Litchfield*, at the time of his application for a renewal. That it was impossible, from the evidence, to fix when Dr. *Saunders* ought to have demanded a renewal, so as to save his lease; unless the exact point of time could be ascertained, when the presumption of their being alive ceased, and of their being dead began; and consequently, there was no proof of a breach of the covenant for renewal by any lapse of time. If it was to be supposed, that *Parrott* and *Litchfield* were dead in the wars, before the lease granted by the respondent's ancestor to Dr. *Saunders*, it was the fault of the lessor to grant such a lease; but if it was to be presumed that they were then living, not the least evidence had been offered of their deaths, but only of their long absence. And it would be of very fatal consequence to lessees of this kind, who were very numerous in *Ireland*, to be obliged, upon pain of forfeiting their leases, to make applications to renew, before they have notice of the deaths of their *cestui que vies*; especially as it is in the power of the landlord, by the *Irish* statute of 7 *Will. III.* c. 8. to call upon his lessee, after seven years absence of a nominee or *cestui que vie*, and oblige him to prove him to be living. But supposing Dr. *Saunders* to have been guilty of any neglect or delay in this case, it is the constant practice of Courts of Equity to relieve against a lapse of time in the performance of covenants or conditions, where, as in the present case, a compensation can be made for the delay; and more especially, where such lapse of time has happened by mistake or accident, and where the injury arising from a refusal of relief will be irreparable, by losing the estate itself, and all the improvements made upon it in confidence of a continuance of the lease.

D. Ryder.  
T. Clarke.



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W. Murray.

J. Browne.

On the other side it was contended, that the lease being determined, and the time for renewal long since elapsed, and Dr. *Saunders* having declined all applications to add any new life, till near three years after the decease of the surviving *cestui que vie*, there was no foundation to relieve against the lapse of time, even supposing it to have happened from an innocent neglect; because it was an essential part of the agreement, that the new life should be named within the limited time; and was inserted for this particular purpose, that the lessor might from thenceforth have his chance of a new fine, by the death of the new *cestui que vie*; and therefore a Court of Equity could not dispense with the lessees neglect of nomination, without destroying a substantial part of the contract, and depriving the lessor of a beneficial chance, for which the Court could not give a compensation. That Dr. *Saunders* appeared, from a variety of circumstances, to have acted a very unfair part; not only by changing the description of one of the *cestui que vies*, but also in attempting, by concealment and misrepresentation of the truth, to ensnare the respondent into a renewal: For it was in proof, that upon the treaty in *February*, 1732, in *Dublin*, and upon the respondent's desiring to know how long *Clarke* had been dead, Dr. *Saunders* affirmed, that he had been dead only about thirteen or fourteen months; tho' he knew that *Clarke* had been dead near three years, and tho' he had actually, on the 7th of *April*, 1730, renewed a lease with *George Alcock*, who was *Clarke's* devisee. And when the respondent, at the same time, enquired what was become of *Thomas Litchfield*, one of the original *cestui que vies*, Dr. *Saunders* falsely affirmed, that he was in the country; tho' in the year 1727, he had renewed an under lease for the life of *John Winnett*, in the room of *Litchfield*, and took 56*l.* for it, which was the full fine for adding a new life. And as to *Joshua Parrott*, the other original *cestui que vie*, whose description was varied in the renewed leases, as before mentioned, the respondent having some suspicion of his death, particularly enquired of Dr. *Saunders*, during the treaty, if he was then living; to which the Doctor affirmed, and repeated the affirmation, that *Joshua Parrott*, the *cestui que vie* in the lease, was alive, and had been with him about three weeks or a month before, and was a poor old man, to whom he had given a piece of money: All which now appeared to be a mani-



a manifest untruth. As to the pretence, that the description of this man was varied by the mistake of the ingrossing Clerk, there was not the least proof, or even a probability of it; for there was nothing that could mislead the person who drew or ingrossed the new lease, it being naturally the practice to follow the descriptions of the old leases, and not to form new and different ones. It was therefore hoped, that after so long an acquiescence under the decree of November, 1736, for dismissal of the original bill, and after the trial of two ejectments, and verdicts obtained in both; the decrees would be affirmed, and the appeal dismissed with exemplary costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decrees therein complained of, affirmed: And it was further ORDERED, that the appellants should pay to the respondents 100*l.* for their costs, in respect of the said appeal.

DECREES affirmed. Jour. vol. 26. p. 383.

The Right Honourable *Angel, Countess*  
*Dowager of Roscommon,*

} Appellant.

Case 61.

*Thomas Fowke, Esq;*

— Respondent.

*Et è contra.*

*J. L. cited & reserved upon by Lord Mansfield 26th.*

3d April, 1745.

SIR *Henry Ingoldsby*, Bart. grandfather of the appellant and of *Elizabeth*, late wife of the respondent *Thomas Fowke*, being seised in fee of several castles, manors and estates in the counties of *East Meath* and *Clare*, and of several houses in the city of *Limerick* in *Ireland*; and having issue two sons, *William* his eldest, and *Charles* his younger son; by indentures of lease and release, dated the 2d and 3d of *July*, 1694, in consideration of a marriage then lately had between the said *William Ingoldsby* and *Theophila* his wife, and in pursuance of articles, dated the 24th of *October*, 1691, made previous to that marriage, and for other considerations in the settlement mentioned; Sir *Henry* granted and conveyed all the before mentioned estates in *East Meath*



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*Meath* and *Clare*, by their particular denominations, and all other his estates in those counties, or elsewhere in the kingdom of *Ireland*, to Sir *Berkley Lucy* and Colonel *Ingoldsby*, and their heirs, to the uses following:

As to the estates in the county of *East Meath*, to trustees for a term of 60 years, if *William Ingoldsby* and *Theophila* should so long live, to secure an annuity of 150*l.* per ann. to *Theophila* for her separate use; remainder to *William Ingoldsby* for life; remainder to trustees to preserve contingent remainders; remainder to *Theophila* for life; remainder to the first and other sons of *William* and *Theophila* in tail male; remainder to trustees for a term of 500 years, to raise portions for daughters of that marriage; remainder to the first and every other son of *William* by any other wife in tail male; remainder to *Charles Ingoldsby* for life; remainder to trustees to preserve contingent remainders; remainder to the first and every other son of *Charles* in tail male; remainder to Sir *Henry Ingoldsby*, and the heirs of his body; and after other remainders, which never took effect, remainder to Sir *Henry Ingoldsby* in fee.

As to the estates in the county of *Clare* and city of *Limerick* (except the lands of *Clanderilaw* and several other lands, particularly described and excepted) to the use of Sir *Henry Ingoldsby* for life; remainder, as to part, to Dame *Ann* his wife for life; remainder of the whole to *William Ingoldsby* for life; remainder to trustees to preserve the contingent remainders; remainder to the first and other sons of *William* and *Theophila* in tail male; remainder to trustees for 400 years, to raise portions for daughters; remainder to the first and every other son of *William Ingoldsby* by any other wife; with like remainders over to *Charles* and his issue male, as were limited of the *East Meath* estate; with remainder to Sir *Henry Ingoldsby* in fee.

And as to the lands of *Clanderilaw*, *Derialicky*, *Derigybee* and the other lands in the county of *Clare*, excepted out of the precedent limitation, to the use of Sir *Henry* for life; remainder to *Charles Ingoldsby* for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to Sir *Henry* and the heirs of his body, with several other remainders over, which never took effect; remainder to Sir *Henry Ingoldsby* in fee.



Fines and recoveries were afterwards levied and suffered of all the before mentioned estates, in pursuance of a covenant in this settlement.

Sir Henry Ingoldsby and his wife died in 1701, and Charles, his second son, died in 1703, in the life-time of William Ingoldsby (then Sir William) leaving one son Henry, who died without issue in 1719, and one daughter, the appellant Lady Roscommon.

Sir William Ingoldsby had issue by Theophila, his wife, only one daughter, Elizabeth; who afterwards, with the consent of Sir William, intermarried with the respondent Thomas Fowke, and was, by virtue of the settlement, entitled to a portion of 3000*l.* which was afterwards paid by Sir William to the respondent.

Sir William Ingoldsby, after the death of his wife without issue male, and of his brother Charles and Henry his son without issue male, being, as heir of the body of Sir Henry Ingoldsby, tenant in tail general of all the before mentioned estates, by virtue of the several limitations in the settlement; by indentures of lease and release, dated the 20th and 21st of October, 1719, conveyed all the estates in *East Meath* and *Clare*, and in the city of *Limerick* (except *Gortaseen* which was not then in his possession) to Thomas Barry, to make him tenant to the precipe, that recoveries might be suffered of those estates, which recoveries were thereby declared to be to the use of Sir William and his heirs.

In *Easter* term, 1720, recoveries were accordingly suffered of the *East Meath* and *Clare* estates; but the houses in *Limerick* being of small value, no recovery was suffered of them.

The remainders in the settlement of 1694, of the *Clare* and *East Meath* estates, being barred by these recoveries, and Sir William thereby becoming seised in fee simple; in *Easter* term, 1724, he, together with the respondent Fowke and Elizabeth his wife, levied a fine *sur conusance de droit*, &c. to James Medlicott, of the lands in *Girley* and *Curragh Town* in the county of *Meath*; and in *Hilary* term, 1725, in consideration of 1100*l.* another fine was levied by them of several other parts of the estate in the county of *Meath* to Thomas Jones, Esq; and other



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parts of the estate in the county of *Clare* were granted in fee farm by Sir *William*, reserving certain rents.

In *April*, 1726, Sir *William Ingoldby* died; and upon his death, the fee simple and inheritance of the lands in the counties of *East Meath* and *Clare*, included in the recoveries in 1720, and the rents of such of them as had been afterwards granted in fee farm by Sir *William*, descended to *Elizabeth*, the respondent's late wife, as his only child and heir; and she became entitled to an estate tail in the other premises, not included in these recoveries, under the limitations in the settlement of 1694. And being so seised, by indenture quadrupartite, dated the 6th of *June*, 1726, and made between the respondent and *Elizabeth* his wife of the first part, the Most Noble *James*, Duke of *Chandos* and Sir *Berkley Lucy* of the second part, *Richard Pierfon* and *Robert Allen*, Esqrs. of the third part, and *James Howison*, of the city of *Dublin*, Esq; of the fourth part; the respondent covenanted and agreed with *Howison*, that he and his wife would, before the end of *Michaelmas* term then next ensuing, levy fines *sur conusance de droit*, &c. with proclamations of all the lands in the counties of *Meath* and *Clare*, and the houses in *Limerick*, and the fee farm rents of such of the lands as had been granted by Sir *William*, and all other the castles, manors, messuages, towns, lands, tenements, fee farm rents and hereditaments whatsoever, which descended or came to *Elizabeth*, the respondent's wife, by the death of Sir *William* or Sir *Henry Ingoldby*, or in which she or the respondent in her right, or any other in trust for her, had any estate in the counties of *East Meath* or *Clare*, or in the city of *Limerick* or elsewhere in the kingdom of *Ireland*, to the several uses following; viz.

As to all the estates in the county of *Clare* and city of *Limerick* (except *Gortafeen*) and also all the premises called *Girley*, or *Newton-Girley*, or *Curragh Town*, in the county of *Meath*, to the use of the respondent for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of *Elizabeth*, the respondent's wife, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the Duke of *Chan-*

*dos*



dos and Sir Berkley Lucy for 500 years, to raise 3000 l. portions for younger children of the respondent and *Elizabeth*; remainder to the first and other sons of the respondent and *Elizabeth* in tail male; remainder to their daughters in tail general; and for default of such issue, remainder to *Elizabeth Fowke* and her heirs.

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And as to all the premises in the county of *Meath* (except the before mentioned premises in *Girley* and *Newton-Girley*, and *Curragh Town*) and also the lands of *Gortaseen*, and all the other estates intended to be comprised in the said fines, of which no use was before limited; to the use of *Pierston* and *Allen* and their heirs, upon trust, by sale or mortgage, to raise such sums of money as the respondent and *Elizabeth* his wife, or the survivor of them, should, by any writing under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more credible witnesses, direct or appoint; and after raising and payment of such sums and their charges, to convey the residue of the premises unsold, and the equity of redemption of such as should be mortgaged, to the respondent for life, without impeachment of waste; and after his decease, to the use of such person and persons, and for such estate and estates, and chargeable with such sum or sums, as the said *Elizabeth* should, by any writing under her hand and seal, attested by two or more credible witnesses (notwithstanding her coverture, and as if she were sole and unmarried) direct, limit or appoint; and for want of such direction, limitation or appointment, to convey the same to her, and her heirs and assigns for ever. And in this indenture was contained a proviso in the words following: "Provided always, and these presents are upon this condition, nevertheless, that if there shall be no issue by the said *Thomas Fowke* on the body of the said *Elizabeth* his wife begotten, or being such, all of them shall die in the life-time of the said *Elizabeth*; that then and in such case, it shall and may be lawful to and for the said *Elizabeth*, by any writing under her hand and seal, attested by two or more credible witnesses (notwithstanding her coverture, and as if she were sole and unmarried) to revoke, alter, change or make void all or any the use or uses, estate and estates, trusts, limitations, declarations and agreements in these presents



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“ contained (except the estate for life herein before limited or  
 “ intended to be limited to the said *Thomas Fowke*; without  
 “ impeachment of waste, and except such estates as shall be sold  
 “ or mortgaged by the said *Richard Pierſon* and *Robert Allen*,  
 “ for raising money as aforesaid, and except such fee farm  
 “ grants and leases for years, as shall be made by virtue of the  
 “ power herein before mentioned): And *by the same or any other*  
 “ *deed*, (notwithstanding her coverture, and as if she were  
 “ sole and unmarried) to grant, limit and appoint the same  
 “ premises, or any part or parcel thereof, to any person or  
 “ persons whatsoever, for such use and uses, estate and estates,  
 “ either in fee simple, fee tail, or for life or lives, or for any  
 “ term or number of years, determinable on any life or lives,  
 “ or any term or number of years certain, and charged and  
 “ chargeable with such annual sum and sums of money, and  
 “ in such manner and form, as the said *Elizabeth* shall think  
 “ fit, direct or appoint; any thing herein before contained to  
 “ the contrary notwithstanding.”

In *Michaelmas* term, 1726, fines with proclamations were duly levied by the respondent and his wife to *James Howison*, of all the before mentioned estates in the counties of *Meath* and *Clare*.

Some of the estates were sold by the trustees, and others mortgaged, in pursuance of the aforesaid trust, with the concurrence of the respondent and his wife, for the payment of *Sir William Ingoldsby's* debts, and for other purposes; but the lands conveyed to the trustees by the deed of 1726, not being sufficient to discharge all the debts and incumbrances affecting the estates, and the respondent not having any issue by *Elizabeth* his wife, living; by indentures of lease and release, dated the 6th and 7th of *July*, 1729, the release being quadrupartite, and made between the respondent and *Elizabeth* his wife and *Robert Allen* of the first part, the Duke of *Chandos* and *Sir Berkley Lucy* of the second part, *John Fowke*, Esq; of the third part, and *Thomas Meagher*, Esq; of the fourth part; reciting the settlement of the 6th of *June*, 1726, and some other subsequent deeds, whereby the interest of *Richard Pierſon*, the trustee, had been assigned to *John Fowke*; and reciting, that part of the premises, vested by the settlement in 1726 in *Robert Allen*.



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and *Richard Pierſon*, had been ſold, and that other parts had been mortgaged; and that the money ariſing by ſuch ſale and mortgages had been applied in ſatisfaction of juſt debts and incumbrances, but that the ſame was inſufficient for the payment and diſcharge of all the debts and incumbrances affecting all the eſtates in the former ſettlement; and that it was therefore neceſſary, for the diſcharge of Sir *William Ingoldsby's* debts, and other debts, that a further part of the eſtates ſhould be veſted in truſtees, to be ſold for payment thereof; and that it was moſt convenient, that the reſidue of the  *Eaſt Meath* eſtate ſhould be ſold for thoſe purpoſes: Therefore the reſpondent and *Elizabeth* his wife and *Robert Allen* conveyed to *John Fowke* and his heirs, all the caſtles, manors and eſtates whatſoever, in the county of  *Eaſt Meath*, which remained unſold, upon truſt by ſale or mortgage, to raiſe from time to time, ſuch ſums of money as the reſpondent and *Elizabeth* his wife, or the ſurvivor of them, ſhould, by any writing or writings under their hands and ſeals, or under the hand and ſeal of the ſurvivor of them, atteſted by two or more witneſſes, direct or appoint; to be applied as they, or the ſurvivor of them, ſhould direct; and after payment of ſuch ſums and their charges, upon truſt, to convey the reſidue of the premiſſes remaining unſold, and the equity of redemption of ſuch as ſhould be mortgaged, to the uſe of the reſpondent for life, without impeachment of waſte; and after his deceaſe, to the uſe of ſuch perſon and perſons, and for ſuch eſtate and eſtates, and charged and chargeable with any annual, or other ſums of money, in ſuch manner as the ſaid *Elizabeth Fowke* ſhould, by any writing under her hand and ſeal, atteſted by two or more credible witneſſes (notwithſtanding her coverture, and as if ſhe was ſole and unmarried) direct, limit or appoint; and for want of ſuch appointment, to *Elizabeth Fowke*, her heirs and aſſigns for ever. And the Duke of *Chandos* and Sir *Berkley Lucy* likewise aſſigned the term of 500 years, of the before mentioned eſtates in the county of *Meath*, veſted in them by the ſettlement of *June, 1726*, to *Thomas Meagher*, upon truſt to attend the inheritance: And there was a proviſo in this deed, that nothing therein contained ſhould extend to alter the uſes in the ſettlement of 1726, limited of the lands of *Gortaſeen*, or of the premiſſes in the county of *Clare* or city of *Limerick*; but that the ſame, being then of the yearly



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value of 778*l.* 5*s.* should stand charged with, and be subject to the raising the 3000*l.* portions, and such other trusts as the said term of 500 years stood thereby limited: And also another proviso, that until the premises in the county of *Meath* should be sold, the respondent and his wife, during their lives, and every other person who should be entitled to the same by the former settlement of 1726, should receive the rents and profits thereof. And a power was given to the respondent and his wife, and the survivor of them, by deed in writing, to lease the estates in the county of *Clare* and city of *Limerick*, to any persons, in fee farm, or for lives or years, as they should think fit, reserving the best improved rent.

The respondent's wife not having any children living, duly made her last will in writing (or writing in nature of a will) under her hand and seal, and in the presence of three credible witnesses, who attested the same in her presence, dated the 13th of *January*, 1734; and thereby, without taking notice of the power in the settlement of 1726, she devised all her estates which descended to her by the death of Sir *William Ingoldsby*, or Sir *Henry Ingoldsby*, and in which she, or the respondent in her right, or any other person in trust for her, then had any estate, in the counties of *Clare*, or *East Meath*, and city of *Limerick*, or elsewhere in the kingdom of *Ireland*, (subject to the legacies therein bequeathed) to the respondent and his heirs.

Soon after making this will, viz. in *July*, 1735, the respondent's wife died; and the respondent continued in possession of all the estates in the counties of *Meath* and *Clare*, and of the houses in the city of *Limerick*, which remained unsold, and were included in the original settlement of 1694; except the lands called *Gortaseen*, (which never were in the possession of the family, and for which an ejectment was brought by the respondent and *Elizabeth* his wife, but no judgment was ever obtained therein) and except the lands of *Clanderilaw*, *Derialicky* and *Derigybee*, and the other lands included in the last limitation in the settlement of 1694.

In *July*, 1736, the appellant filed her bill in the Court of Chancery in *Ireland*, against the respondent and against *John Fowke*, *Robert Allen* and *Thomas Meagher*; setting forth the  
before



before mentioned settlements, and the fines levied by the respondent and his wife, and that she was in seisin and perception of the rents being 104*l.* *per ann.* of the lands of *Clanderilaw*, and the other excepted lands in the county of *Clare*; and insisted, that as heir general of Sir *Henry* and Sir *William Ingoldsby*, and of *Elizabeth* the respondent's late wife, she was entitled to the reversion of the premises in the counties of *Meath* and *Clare*, and city of *Limerick*, after the death of the respondent, and to the immediate seisin of *Gortaseen*; but could not sue for the same, having none of the title deeds, nor a knowledge of any of the settlements, but from the enrolment of the original settlement and memorials of other deeds in the respondent's custody; and charged, that the respondent had made leases of part of the premises, and intended to sell or incumber the other estates; and therefore prayed, that the respondent might set forth a list of the deeds in his hands relating to the premises, and the contents thereof, and Sir *William's* title to *Gortaseen* and his debts, and any other deeds or fines, except those stated by the bill, which were levied or executed by the respondent and his wife; and a list of the lands sold and leased, and the sums received thereby, and whether he executed any leases in reversion, or accepted of any surrenders, and what fines he received on leases.

To this bill the respondent put in an answer and plea; and to so much of the bill as required the respondent to set forth the deeds and writings relating to the said estates, or any part thereof, in his custody or power, except the deeds set forth in the answer; or that prayed a discovery of the debts of Sir *William Ingoldsby*, or of the estates which were leased, mortgaged, or sold by the respondent and his wife, or by him since her death, or of the monies raised thereby, or how the same were applied, or whether the respondent and his wife had executed any deeds, or levied any fines, except those before mentioned, or whether he had made any leases of the premises, or accepted fines on granting such new leases; and in bar of the relief prayed by the bill, the respondent pleaded the settlement in 1694, and the other deeds and fines before mentioned, and the will of *Elizabeth* his late wife; and insisted, that by the common recoveries suffered by Sir *William Ingoldsby*, he became seised in fee of the premises therein contained; and



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and that the remainders in tail created by the settlement in 1694, were barred and destroyed; that the inheritance of the premises descended to *Elizabeth* his wife; and that she, by joining with him in levying the fines in 1726, and executing the before mentioned deed of the 6th of *June*, 1726, to declare the uses of those fines, and by virtue of the power of revocation therein contained, was well enabled to execute the deeds of the 6th and 7th of *June*, 1729, and to make her said will; and that by virtue thereof, he was well entitled to the inheritance of those estates; and that the appellant was barred of all right or claim thereto.

This plea came on to be argued upon the 24th of *May*, 1737; when it was ordered, that the benefit of it should be reserved till the hearing, with liberty for the appellant to except to the answer.

On the 20th of *November*, 1741, the cause was heard; and on the 11th of *December* following, it was ordered, that a state of the case should be drawn up and sent to the Court of Common Pleas, for the opinion of that Court; "Whether the will, or writing purporting to be the will of *Elizabeth Fowke*, bearing date the 13th day of *January*, 1734, be a due execution of the power in the deed of the 6th day of *June*, 1726, or not?" And further directions were reserved, till after the Court should have certified their opinion.

In pursuance of this order, a case was accordingly stated; and the said Court of Common Pleas, after hearing the matter spoken to by counsel on both sides, were pleased to give their opinion in writing, in the words following; "We are of opinion, that the will, or writing purporting to be the will of *Elizabeth Fowke*, bearing date the 13th day of *January*, 1734, is a due execution of the power in the deed of the 6th of *June*, 1726." *Henry Singleton*, *George Gore*, *Robert Lindsay*.

Upon the return of this certificate, the cause came on again to be heard for further directions, upon the 3d of *February*, 1742, and was adjourned till the 7th; when it was (amongst other things) ordered and decreed, that the respondent should bring



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bring in and deposit with the Usher of the Court, all the deeds, papers and writings which were in his hands, power, or custody, at the time of filing the bill, or since, relating to the lands of *Curragh Town* in the county of *Meath*, *Gortafeen* in the county of *Clare*, and the houses and lands in the city of *Limerick*, subject to the further order of the Court; and that no person should have inspection of the said deeds, papers and writings, without the order of the Court: And it was further declared and decreed, that the appellant was entitled unto, and should have and recover the lands of *Gortafeen*, and the reversion of the houses and lands in the city of *Limerick*, after the death of the respondent; and that all temporary bars, as to the said houses and lands, should be set aside: And it was further ordered and adjudged, that the plea put in by the respondent, should be allowed; and that the bill, as to all the lands mentioned in the plea (except the lands of *Gortafeen* and the premises in *Limerick*) should be dismissed; and his Lordship was pleased to reserve the consideration of the appellant's applying to the Court, to set aside all temporary bars as to the lands of *Curragh Town*. And it was further ordered, that it should be referred to the Master, to take an account of what debts affected the estate of Sir *William Ingoldsby*, at the time of his death, and what part thereof had been paid, and by whom, and also what were the debts affecting the same since his decease, the amount of such debts, and by whom contracted, with other directions usual as to matters of account; and further directions were reserved till after the report.

From this decree the Countess appealed; insisting, that in case the former power of revocation continued, notwithstanding the subsequent deed of *July*, 1729, *Elizabeth Fowke* had not properly executed that power by her will; for according to the words and intent of the power reserved to her by the deed of *June*, 1726, it ought to have been executed by deed, and not by will; and therefore the reversion of the estates in *Clare* descended to the appellant. That two powers were reserved to *Elizabeth* by the deed of 1726, one to revoke the uses of the estates in *Clare*, by deed; the other, to limit such parts of the estates in *East Meath* as remained unsold, by any writing: Now she had made a will without reciting any power, and thereby gave all her estate to her husband; which might be a proper

D. Ryder.

W. Murray.



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execution of the latter power, but not of the former. It was reasonable therefore to suppose, that she only intended to do what she regularly had done: And upon this supposition, she had provided for her husband in an ample manner for his life, and even given him some part of the estate in fee; but had permitted the reversion of other part, to descend to the heir at law of the family: And this seemed to be a reasonable and equitable disposition. That as the lands of *Gortaseen* were not in the fines, nor was *Elizabeth* ever in possession, the Court had declared the appellant to be entitled thereto in possession; and therefore the deeds and writings thereof, ought to have been decreed to be delivered to her. That as the houses in *Limerick* were not in the fines, they were declared by the decree to belong to the appellant in reversion; and the deeds and writings ought not only to have been directed to be brought into Court; but the appellant ought to have been permitted to peruse and take copies of them: And for the same reason, she was entitled to the same decree as to the lands of *Derialicky* and *Derigybee*. And as the lands of *Curragh Town* were not comprised in the fines levied by *Elizabeth Fowke*, they could not be affected by the deeds which she had executed; and therefore it was conceived, that all temporary bars as to these lands ought to have been removed; and that the appellant ought to have been at liberty to have inspected and taken copies of the deeds and writings relating thereto.

As to the objections taken to the decree by the cross appeal, that the deeds and writings ought not to have been directed to be produced; and that no account ought to be taken of Sir *William Ingoldby's* debts, or of the money raised by sale of his estate; the appellant insisted, that in these particulars the decree was right. For as to the first objection, it was already answered, and must depend upon the right to the estates; and as to the second, Sir *William* died seised in fee of the several lands claimed by the appellant; and therefore such lands were legal assets as to his specialty creditors. If therefore the appellant was entitled to any of these lands, an account of Sir *William's* debts, and of what sums had been raised for the payment thereof, was absolutely necessary to be taken; in order that it might appear, how far the lands claimed by the appellant, were liable to the payment of those debts.



In opposition to the grounds of the original appeal, it was argued on the part of the respondent, that he was entitled to the absolute inheritance of all those estates, which descended to *Elizabeth* his late wife from Sir *William Ingoldsfy*, and were included in the settlement and fines of 1726. For by the power which she reserved to herself in that settlement, she was enabled by *any writing* under her hand and seal, attested by two or more credible witnesses, to revoke and change all the former uses therein limited; *and by the same* [writing] *or any other deed*, to appoint new uses: And her will (or the writing in nature of her will) was a good execution of this power of revocation and appointment; it being a writing under her hand and seal, attested by three credible witnesses; and substantially as well as literally answering the description, and comprising all the requisites of the power. That to confine the execution of the power as if designed to be *by deed only*, by reason of the latter words in the proviso [*by the same or any other deed*]; and to infer from thence, that *the writing* expressly mentioned in the former part of the power, and referred to even in this latter branch of it, must be *only* such a writing as is in point of law a *deed*; would be to make a construction of the power directly contrary to the former part, which enabled her to revoke the old uses *by any writing*; as well as to the latter part of it, which enabled her to appoint new uses *by the same* [writing]; and would be to defeat and take away the operation of clear and plain words by implication and inference only: And this too in a case, where the most liberal construction in favour of the execution of the power is always made; this being a power reserved by the owner of the inheritance, and therefore to be considered as part of the original dominion, or right of disposal, which a tenant in fee simple has by law over his estate.

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J. Browne.

T. Clarke.

And in support of the cross appeal it was contended, that the only part of the estate which by the decree the appellant was declared to be entitled to, was the lands at *Gortafeen*, and the houses in *Limerick*, of very small value; the decision of the right to the lands at *Curragh Town*, being reserved by the decree for the future consideration of the Court; and the deeds and writings which the decree directed to be brought into



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into Court, as relating to these three small parcels of the estate, concerned also the title of the other estates, which were the property of the respondent; and with respect to which, the appellant's bill was dismissed. And it would be extremely inconvenient and prejudicial to the respondent, to have all his deeds continued in the hands of the Court, and to be deprived even of an opportunity of inspection, without the particular order of the Court. Whereas, on the other hand, the appellant could suffer no injury by these deeds continuing in the respondent's custody; since the original settlement of 1694, was inrolled, and the fines and recoveries which made out her title were upon record; and all the subsequent settlements, in which any of those lands mentioned in the decree were included, derived no title to the appellant; but on the contrary, proved and verified the respondent's title against her. That the account directed by the decree, and the other directions relating thereto, could not any way concern the appellant, since the estates which she was decreed to be entitled to, *viz.* *Gortaseen* and the houses in *Limerick*, were not included in the recovery suffered by *Sir William Ingoldby* in 1720, and therefore the old intail of those estates was still subsisting; and consequently, they could not be charged or affected with his debts, or any since contracted by the respondent or his late wife. And that the other directions of the decree in favour of the appellant were improper, without having other parties before the Court; nor did the appellant by her bill, pray any decree for immediate possession, or set up a title to any of the estates, but only in reversion after the death of the respondent.

DECREE  
reversed,  
in part,  
Jour. vol. 26.  
p. 476.

AFTER hearing counsel on this appeal, and hearing the Judges present, on certain points of law to them proposed\*;

\* These points do not appear upon the journal; but in a memorandum on the back of the printed case, it is said, that the following questions were put to the Judges, *viz.* "Whether the power of revocation contained in the indenture of 1726, was executed, extinguished, or altered by the indenture of July, 1729, as to the lands and premises in the county of *Clare*? And if not, Whether the writing executed by Mrs. *Elizabeth Fowke*, in nature of a will, was a good execution of the said power?" And that the Judges present answered, that no extinguishment, or alteration of the power was made by the indenture of 1729, and that the writing executed by Mrs. *Fowke* was a good execution of the said power.

it



it was ORDERED and ADJUDGED, that in the direction contained in the decree for bringing in deeds, papers and writings, after the words ["city of *Limerick*,"] these words should be inserted ["and the lands of *Girley*, *Derialicky* and *Derigybee*"]; and that after the words, ["Court, and that"] these words should be omitted, viz. ["no person or persons do have inspection, or copies of the said deeds, papers, or writings, without the order of this Court"] and that instead thereof, these words ["any of the parties be at liberty to inspect the same, and take copies thereof, or of such parts thereof as they shall think fit, at their own expence"] should be inserted: And it was further ORDERED, that such part of the said decree as related to the accounts thereby directed, should be reversed; and that the same in all other respects not now varied, should be affirmed.

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*Richard Cooke*, Esq; and *Nathaniel Wilkes*, } Appellants. Case 62.  
Esq; - - -

*Thomas Smee*, Clerk, - - - Respondent.

8th November, 1745.

THE church and rectory of *Chishull Magna*, otherwise *Upper Chishull*, in the county of *Essex*, was antiently appropriated to the Abbot and convent of the monastery of *Walden*, in the said county; and by an instrument of endowment, intituled, "a composition," made between the said Abbot and convent and the Vicar of *Chishull* aforesaid, dated the 4th of *May*, in the 10th year of the consecration of *Roger*, then Bishop of *London*, which was in the year of our Lord 1239; the Bishop, after reciting that he had admitted *Richard* of *Burden* to be Vicar of the said church of *Chishull Magna*, at the presentation of the Abbot and convent of *Walden* aforesaid; ordained, that he the said Vicar, as or by the name of the Vicar, should receive all small tithes and oblations, and the tithe of hay, and some other tithes therein mentioned; and should also receive four quarters of wheat, four quarters of barley, and four quarters of oats, out of the barn of the monks of *Walden* aforesaid.



Afterwards, by an instrument of augmentation, dated the 1st of December, 1441, under the seals of *Robert*, then Bishop of *London*, and of the Abbot and convent of *Walden*; reciting, that the then Vicar of *Chishull Magna* had complained to the Bishop, that the profits and income of the said vicarage were then so small, that the same were not sufficient to support himself, and sustain the burthen of the said vicarage; and that he the Bishop had issued out a commission to enquire into the truth thereof, and also of the value of the revenues of the said Abbot and convent; and that by an inquisition taken thereupon, the income of the said vicarage was found not to exceed the yearly value of 6*l.* 4*s.* one year with another: The Bishop therefore, upon due consideration had of the premisses, plainly found that the said vicarage was so diminished and small in its income, that the Vicar thereof, without a competent augmentation, could not reside there, nor perform the necessary duty belonging to the said vicarage; and the Bishop, out of his pastoral care, having called before him the said Vicar and Abbot and convent, who judicially appeared; the Bishop did, with the consent of all parties concerned, by a definitive sentence and by the said instrument, ordain and decree, that the said Abbot and convent and their successors, should pay out of the tithes and fruits belonging to the said Abbot and convent, in the name of the said church, by the hands of their farmer, or of whatever occupier there should be of the same for the time being, four marks of *English* money yearly to the then Vicar for his life, and should afterwards pay to every of his successors, Vicars of the said vicarage, the yearly sum of 40*s.* for ever, in augmentation of the said vicarage, at the several times therein mentioned; and the Bishop did thereby adjudge and order the said Abbot and convent and their successors, and all and every other person and persons, who should become possessors of the said church and rectory, to pay the same for ever; and did thereby charge the payment thereof, on the tithes belonging to the said Abbot and convent as aforesaid accordingly for ever; and that the said Vicar and his successors should enjoy all the tithes and profits which they formerly used to receive, together with the money decreed to them by the said definitive sentence and instrument.

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Upon the dissolution of monasteries in the reign of king *Henry VIII.* the said abbey or monastery of *Walden*, and the lands, tithes and possessions thereof were seized into the hands of the Crown, and afterwards granted by the Crown to *Thomas*, Lord *Audley*; and the rectory or impropriation of the said church of *Chishull Magna*, and the great tithes thereto belonging, by divers mesne conveyances came to *John Cooke*, Esq; deceased, grandfather of the appellant *Richard Cooke*, who paid the four quarters of wheat, four quarters of barley, and four quarters of oats, and yearly pension of 40*s.* granted by the respective instruments afore said, or some yearly composition in money in lieu thereof, to *Robert Parr*, Clerk, then Vicar of the said church of *Chishull Magna* for many years, and to the time of his death, which happened in the year 1690.

After the death of *Parr*, the vicarage was put under sequestration, and remained so for several years, without a Vicar, until 1715, when *John Ward*, Clerk, was presented by the Crown by lapse to the said vicarage, and was instituted and inducted therein; and the said *John Ward* soon after exhibited his bill in the Court of Exchequer, to be paid the said yearly quantities of corn and the said 40*s.* in money yearly, against the then impropriator of the said rectory of *Chishull Magna*; but before the cause was heard, he resigned the vicarage on the 22d of *August*, 1719, and the respondent was presented thereto, and instituted and inducted therein on the 21st of *February*, 1721.

In *Michaelmas* term, 1737, the respondent, as Vicar of the said church, exhibited his bill in the Court of Exchequer against the appellant *Richard Cooke*, the then Impropriator of the rectory; to be paid the arrears of the said four quarters of wheat, four quarters of barley, and four quarters of oats yearly, and of the said yearly sum of 40*s.* which had become due to him, and of which he had not received any part; and that the respondent's right, as Vicar, to the said yearly payments of corn and money, might be established, and that the same might be decreed to be paid and delivered to him and his successors for the future.

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The appellant *Cooke* put in his answer to this bill; and afterwards in *April*, 1739, and while the cause was depending, he sold the said rectory, and the tithes and possessions belonging thereto, to the appellant *Wilkes*, who had notice of the said suit, and of the respondent's claim.

The respondent having, since filing his original bill, discovered some writings, receipts and accounts, which passed between the appellant *Cooke's* grandfather and the said *Robert Parr*, relating to the payment of the said yearly quantities of corn, and of the said yearly sum of 40s.; the respondent applied to and obtained leave of the Court to file a supplemental bill, and put these new matters and evidence in issue (divers witnesses having been then examined, as well on the part of the respondent, as of the appellant *Cooke*, and publication having also passed in the cause); and thereupon the respondent, in *Michaelmas* term, 1740, exhibited his supplemental bill against both the appellants, to be paid the said yearly quantities of corn, and yearly sum of 40s. and to have the same established, in such manner as was prayed by the original bill.

The appellants put in their respective answers to this supplemental bill; and thereby admitted, that pending the said suit, the appellant *Wilkes* had purchased of the appellant *Cooke* the said rectory or parsonage impropriate of *Chishull Magna*, and the tithes and possessions thereof; and the appellant *Wilkes* submitted to be bound by the determination of that cause, and did not deny notice of the said suit before he purchased; but both the appellants denied the legality of every article of the respondent's demands.

The cause being at issue, as to the new matters alledged by the supplemental bill, divers witnesses were examined on the part of the respondent touching the same; and publication having duly passed, the cause came on to be heard before the Barons, on the 24th of *November*, 1743; when it was ordered and decreed, that the said antient annual payments of four quarters of wheat, four quarters of barley, and four quarters of oats, and of 40s. yearly should be established; and that the appellant *Cooke* should account for the same before the Deputy Remembrancer, according to the value of the said respective quantities



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quantities of corn, and also for the said 40s. a year during the several years he was in possession of the said rectory, or received the rents and profits thereof; and that the appellant *Wilkes* should also account for the value thereof, from the time he purchased and came into the possession of the said rectory; and that what should be found due from the appellants respectively on the said account, should be paid by them respectively to the respondent; and that the appellant *Cooke* should pay to the respondent, the costs of suit to the time of filing the supplemental bill, and that both the appellants should pay the costs thereof from that time.

The respondent, thinking himself aggrieved by so much of this decree, as directed the appellant *Wilkes* to account for and pay the value of the corn and the 40s. a year, only from the time of his purchase; and being advised, that the said yearly payments of corn and money affected the estate and inheritance of the said rectory, and were an incumbrance and charge thereon, and on the tithes and possessions thereof, which had been purchased by the appellant *Wilkes*; and that the respondent was entitled to a satisfaction for all the arrears of the said yearly payments out of the said rectory, into whose hands soever the same should come; the respondent therefore applied to the Court of Exchequer to rehear the cause on that point, and it was accordingly reheard on the 23d of *April*, 1744; when the Court decreed, that the former decree should be varied in the following manner; viz. the Court unanimously declared, That the yearly payments of four quarters of wheat, four quarters of barley, and four quarters of oats, and the said annual payment of 40s. demanded by the respondent's original and supplemental bills, and the arrears thereof, were a charge on the impropriate rectory of *Chishull Magna*; and it was ordered, adjudged and decreed, that the said payments should be, and the same were thereby established for the future; and that both the appellants should come to an account with the respondent before the Deputy Remembrancer, for the arrears of the said several quantities of corn, according to the value thereof; and also for the arrears of the said annual payment of 40s. from the time the respondent was instituted and inducted to the said vicarage, and should satisfy and pay to the respondent what should appear to be due for the same; and it was referred to the Deputy



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to take the account; in the taking of which account, he was to distinguish what part of the said arrears accrued due in the time the appellants had been respectively in possession of the said rectory, and was to make the appellants all just allowances; and it was further ordered and decreed, that if the appellant *Wilkes* should pay, or should be compelled to pay any thing to the respondent, on account of any arrears which accrued due in the time of the appellant *Cooke*; then the appellant *Wilkes* was to be at liberty to prosecute that decree against the appellant *Cooke*, in the name of the respondent, in order to reimburse himself what he should so pay on account of such arrears; and all other parts of the former decree, not thereby varied or altered, were to stand and be observed by all parties.

D. Ryder.

J. Lacy.

From both these decrees the appellants appealed; insisting, that the endowment and augmentation made by the Bishop to this vicarage of corn and money, was only a personal charge upon the Impropiator for the time being, for which no distress by law could be had, and not any charge upon the land, to bind the same with the payment of the arrears of this corn and money, in whose hands soever the rectory should come; and consequently, that the appellants ought not, either in law or equity, to be answerable to the respondent for any arrears of corn and money, which accrued due before the time that they respectively became Impropiators. That the appellant *Cooke* was answerable for these allowances of corn and money, only during the time of his being in possession of the rectory; and not from the time of the respondent's being instituted and inducted into the vicarage: And especially, as it appeared to be the entire laches of the respondent, in not prosecuting his right against Mr. *Wilcox*, the former Impropiator, for at least fourteen years that he was in possession of the rectory; nor had the respondent even made *Wilcox*, or his representatives, parties to his bill, in order to obtain payment from them for so great a length of time. Neither did the respondent, either by his original or supplemental bill, so much as pretend, that these allowances of corn and money were a charge upon the inheritance of the rectory, into whose hands soever it might come.

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It was insisted on below, that tho' this endowment might not shew a prescriptive right, yet it was not necessarily to be taken as the only original settlement; but that in these ancient transactions, something further might be presumed. — The appellants, however, hoped, that no such presumption would obtain in the present case; for here was shewn the establishment itself, the time when it commenced, *quo jure* it was established; and this would very well account for any payments which might have been made, without supposing any thing but what appears. The Bishop's authority, at least in those early times, might do this, without making the charge a lien upon the rectory in all future time; and the respondent, by his bill, had made the two instruments above mentioned, the sole foundation of his demand.

It was also insisted on below, that the Bishop, by force of the acts 15 *Rich. II.* c. 6. and 4 *Hen. IV.* c. 12. had a power to charge the inheritance. But in answer to this it must be observed, that this endowment was made in the year 1239; whereas the act of 15 *Rich. II.* c. 6. was not made till 1391, and has no relation to any appropriations made before that time; it says only, "That in every licence from henceforth to be made in the Chancery, of the appropriation of any parish church, it shall be expressly contained and comprised, that the Diocesan of the place, upon the appropriation of such churches, shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that shall have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also, that the Vicar be well and sufficiently endowed." But if this act had a retrospect, it did not affect the present question; as it only gives the Bishops power to augment with a competent sum, obligatory between the Rectors and Vicars for the time being. — As to the act 4 *Hen. IV.* c. 12. it ordains, "That in every church appropriated, or to be appropriated, a secular person shall be ordained Vicar perpetual:" But how this affected the present question, could not be easily seen; for before that act, the religious houses were not obliged to employ secular clergy, and



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and they might remove whomsoever they had appointed, at pleasure. It was therefore hoped, that the decree and the order upon the rehearing would be reversed, or varied; and that the appellant *Cooke* should only be answerable to the respondent for these arrears, from the time of filing his original bill; and that the other appellant *Wilkes* should be answerable for the same, only from the time of his becoming the Impropriator.

W. Murray.

T. Bootle.

On the other side it was argued, that at common law, the Ordinary, upon all appropriations, was to take care that a sufficient endowment was made out of the parsonage, for the maintenance of the Vicar; and had a power, as Ordinary, to compel the making it out of the parsonage; but proper care not being taken by the Ordinaries that such endowment was made, whereby many Vicars had not sufficient to maintain themselves; the statute of 15 *Rich. II. c. 6.* was made to prevent the future consequences of such neglect. But this statute not being sufficiently observed, it was afterwards, by the statute of 4 *Hen. IV. c. 12.* ordained, That the former statute should be firmly holden and kept, and be put in execution, and that all appropriations made contrary to that statute should be void; and that from thenceforth, in every church so appropriated, a secular person should be ordained Vicar perpetual, canonically institute and induct in the same, and convenably endowed by the discretion of the Ordinary, to do divine service, and to inform the people, and keep hospitality there. Now, if an endowment created no charge or lien on the rectory or parsonage itself, but only a personal charge on the Rector or Impropriator for the time being, it would be very precarious indeed, and the Vicar would not have a certain maintenance; because, by the death of the Rector or Impropriator, all the arrears might be lost, and the Vicar be starved: Whereas the plain intention of these statutes was, that the endowment should be a charge or lien on the rectory itself, as an incumbrance thereon; and that the rectory should be a security for, and chargeable with all the arrears for the support of the Vicar, into whose hands soever it should come. That the Vicar is, by law, entitled to all the fruits and profits of his vicarage, from the time of his induction; and it seeming in this case to be admitted, that the respondent, as Vicar, was entitled to



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to the said several annual payments, there appeared to be no reason why the rectory should be discharged from paying the arrears thereof for any part of the time; the respondent having actually served the cure during the whole time, and these payments being in the nature of wages for such his service. As to the length of time before his original bill was brought, there was a suit depending for many years in the Court of Chancery, between the appellant *Cooke* and one *Jarvis Wilcox*, (whose father had purchased the rectory of *Cooke's* father) and others, about the title to this rectory; which cause was not heard till the 12th of *June*, 1733, nor was it finally determined till some time in 1735; during all which time the rectory was in the hands of a receiver appointed by the Court, and the appellant *Cooke* thereby kept out of possession; so that till the event of that suit, the respondent could not know against whom to bring his bill. That it was proved in the cause, that many years ago *John Cooke*, the appellant's grandfather, who was Impropiator of this rectory, paid to *Robert Parr*, the Vicar, the said several quantities of corn in kind; and that on the 23d of *February*, 1664, the said *John Cooke* accepted a lease from *Parr*, of the said yearly quantities of corn, and of the said yearly sum of 40s. in money, for a term of three years, under the yearly rent of 16l. payable quarterly; and that by several subsequent agreements, *Cooke* held the said quantities of corn and yearly sum, as tenant or lessee thereof under *Parr*, for many years, at the like yearly rent. That the appellant *Wilkes* purchased pending the suit, and with notice of the respondent's demand; and could not, therefore, be in any better condition than the appellant *Cooke* would have been, had he continued owner of the rectory, until the time of the decree.

AFTER hearing counsel on this appeal, and the unanimous opinion of the Judges present, upon a point of law to them proposed; \* it was ORDERED and ADJUDGED, that the decree

DECREE affirmed.  
Jour. vol. 26.  
p. 516.

\* The journal is also silent as to this point; but from a memorandum on the printed case, it appears that the following question was put to the Judges, viz. "Whether the appellants were liable, in this case, to answer and pay the arrears of the annual payments in question, which became due before they respectively came into the rectory?" And that the Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the Judges, that they were liable.



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or order made on the rehearing should be so far varied, as that the appellant *Wilkes* was only to account for the arrears of the said yearly payments, accrued due since the time of his purchase; and that in all other respects, the said decree or order should be affirmed.

Case 63. *William Benson, Esq;* — Appellant.  
*John Vernon, Esq;* — Respondent.

26th November, 1745.

THE end of this appeal being to set aside some proceedings for irregularity, which no way affected the merits of the cause; it will be sufficient to state those proceedings, without entering minutely into the history of the dispute between the parties.

On the 19th of *November*, 1740, the appellant, as mortgagee of an estate in *Ireland*, filed his bill in the Court of Exchequer in that kingdom against the respondent; praying payment of the principal money and interest due on his securities, or that the equity of redemption might be foreclosed. On the 14th of *February* following, the respondent put in his answer to this bill, and thereby impeached the appellant's securities as fraudulent, and without consideration; and on the 14th of *April*, 1741, he filed his cross bill against the appellant; praying that those securities might be set aside, and delivered up to be cancelled.

The appellant's residence being in *England*, a commission was, on the 16th of *July*, 1741, sued out for taking his answer, returnable *without delay*; but in the month of *September* following, and before the answer was taken, the appellant was seized with a disorder in his mind, and continued very ill, and incapable of attending to any business, till about *Christmas* 1742.

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In the mean time, the respondent proceeded in his cross cause, and sued out the usual process of contempt to a sequestration; procured the original bill to be dismissed, for want of prosecution; and on the 19th of *June*, 1742, obtained an order, that the cross cause should be set down to be heard on the sequestration, and the bill taken *pro confesso*. The cause was accordingly heard on the 15th of *July*, 1742, and a decree pronounced against the appellant, setting aside his several securities, and ordering them to be delivered up; and on the 20th of the same month, this decree (according to the practice of the *Irish* Courts of Equity) was made up and inrolled, with costs.

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As soon as the appellant began to be in any degree capable of looking into his affairs, he was apprised of what had been done during his illness; and on the 6th of *December*, 1742, the Court was moved on his behalf, to refer the process of contempt and the subsequent proceedings, for irregularity; and an order was accordingly made for that purpose.

On the 16th of *June*, 1743, the Remembrancer made his report; and as to the irregularity insisted on, (*viz.* that where a commission issues returnable without delay, it is incumbent on the plaintiff's Attorney to obtain and serve a rule or order on the defendant, to return such commission by a day certain, or otherwise that the plaintiff may be at liberty to issue process) reported, that such motions had been made as cautionary by plaintiffs, but that the doing thereof was not declared necessary by the *written* rules of the Court; and that defendants had moved for time to return commissions for taking answers in *England*; that as to the proceedings in this cause, he was of opinion, the same had been regular; but if it was doubtful, yet that no advantage ought to be taken of any irregularity, after a hearing and a decree inrolled.

Pending these proceedings, the appellant's answer was prepared; and on the 20th of *May*, 1743, the same was taken by virtue of the commission; and on the 20th of *June* following, it was delivered on oath into the Remembrancer's office, in order to be filed; but the respondent having on that day obtained an order for confirming the report absolutely, the answer could not be filed.

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The appellant therefore, on the 4th of *July*, 1743, moved the Court, to have the process of contempt, and the decree obtained on the sequestration set aside, and that the answer might be received; and on this motion, the appellant's counsel insisted on the above mentioned instance of irregularity, and offered a certificate of the appellant's incapacity signed by Dr. *Mead* his physician, and Mr. *Gataker* his apothecary, and an affidavit to verify the signing thereof; but the respondent's counsel insisting, that no notice of motion had been given for setting aside the report and the order for confirming it; the Court would make no order upon this application.

The respondent's counsel having objected to the reading of the above certificate, the appellant afterwards procured affidavits of his insanity and incapacity to transact business, from the month of *September*, 1741, till about *Christmas* 1742, (except at very short intervals, when it was both improper and dangerous for him to be troubled with business) which affidavits were sworn before Mr. Baron *Reynolds* in *England*, on the 23d of *November*, 1743, by Dr. *Mead*, Dr. *Monro*, Mr. *Gataker*, and several other persons; and immediately transmitted them to *Ireland*, in order to ground a further application to the Court there. And accordingly, on the 12th of *December*, 1743, a motion was made, that the process of contempt, the decree obtained on the sequestration, and the Remembrancer's report might be set aside; that the appellant's answer might be received, and that he might be at liberty to proceed in his original cause: But the Court thought proper to order, that the appellant should be at liberty to make the same motion, on the first day of the then next *Hilary* term; and that in the mean time, all things should remain as they then were.

On the 7th of *February*, 1743, this motion was renewed, when the appellant offered to pay the respondent his whole costs; but the respondent's counsel objecting to the affidavits being read, the motion was adjourned till the 18th; when it being again repeated, the Court directed the affidavits to be read; but the respondent having produced and read an affidavit, to prove an answer put in by the appellant on the 18th of *May*, 1742, to a bill of revivor in the Court of Chancery of *England*, which in one of his short lucid intervals he had sworn (and which was

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very short, and required neither the time, pains, or capacity, that were necessary for answering the respondent's bill, consisting of above 400 sheets of paper); the Court adjourned the motion for farther consideration, till the 25th of *February*, 1743; when two of the three Barons were of opinion, that the decree being inrolled, could not be set aside; but the other Baron was of opinion, that upon payment of all the costs, and giving security to abide the decree, the appellant ought to have liberty to file his answer, and that the inrolment of the decree should be set aside: The Court however being thus divided, no order was made upon the motion.

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The appellant therefore, as his last resource, brought the present appeal; and on his behalf it was contended, that the process upon which the decree was founded, had been issued irregularly, and without a sufficient foundation; the appellant's Solicitor having never been served with any rule or order to return the commission, which had been usually done in cases of this kind, and was agreeable to reason and justice, in order to prevent any undue surprise upon the adverse party. That judgments obtained by default, even in Courts of law, are frequently, tho' strictly regular, set aside on reasonable terms, if it appears that the party against whom they have been given, has, either by surprise or accident, lost the opportunity of trying the merits of his cause: And in no case can this power of the Court with more reason be exercised, than where (as in the present case) the regularity of the process is admitted to be at least doubtful and disputable; and where it appears from the nature and circumstances of the case, as well as from proper proof by affidavits, that the default could not proceed from any desire to delay or evade the justice of the Court, but arose from the absolute disability of the appellant to make his defence, occasioned by the act of God; and the undue advantage which the respondent took of that disability. That the affidavits of the appellant's incapacity, sworn by persons who attended him in his disorder, were the only proper evidence of it; and proved clearly the impossibility of his putting in his answer, and consequently cleared him from any contempt of the Court, upon which alone such a decree could, with any colour of justice, be founded. That the inrolment of a decree being a mere ministerial act, cannot take away the jurisdiction

T. Clarke.

J. Talbot.



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of the Court in which it is inrolled, to examine into the ground and foundation upon which it was obtained : And as the Court has clearly a jurisdiction to set aside such a decree for irregularity after inrolment, so may it likewise set it aside for any other cause, collateral to what appears upon the record itself, which is a just excuse to the party for not obeying the process upon which the decree is founded ; since without such power of examination and redress in the Courts below, as well as on an appeal in the last resort, a decree by default, however irregularly and unjustly obtained, would, by being immediately inrolled, become a final judgment of an inferior Court, without any possibility of reversal ; altho' there was no wilful default in the party against whom it was pronounced. That permitting the appellant to put in his answer to the respondent's cross bill, and giving him liberty to proceed in his original suit, could be of no prejudice to the respondent, who could lose nothing by the delay, and had all the profit which he could derive from the event of his suit, by its being depending ; the cross bill being only for relief against a demand, which the appellant endeavoured to establish.

D. Ryder.

W. Murray.

On the other side it was insisted, that the Court below did wrong in permitting the affidavits to be read ; as they had no relation to any irregularity, tended to invalidate a decree inrolled, against which nothing extrinsic of the decree could be received, and were sworn before a Judge in another country, who had neither jurisdiction or cognizance in the Court of Exchequer, or kingdom of *Ireland*. That a decree obtained upon process of contempt, was as absolute as any other, and must be treated in the same manner ; and the decree in question being inrolled, if it was regularly obtained, was final and conclusive, and could not be opened or overturned upon motion ; the inrolment being the final judgment of the Court, and therefore the only method of getting rid of it, must be by bill of review and reversal : And that both the decree and the inrolment of it was regular in the present case, appeared in the clearest and fullest manner possible by the Remembrancer's report ; and that report having been absolutely confirmed, without any objection or exception thereto, amounted in the strongest manner to an acquiescence and admission on the part of the appellant, that the proceedings were regular ; consequently, he  
could



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could not now be admitted to impeach the report by way of appeal; and if not, then the report and all the process leading to it, must stand, the whole being reported regular: So that the drift of the present application, was to set aside the decree for irregularity, after it had been determined by the Court, and admitted by the parties, that there was no irregularity. Neither was there any fraud or surprise upon the appellant in obtaining this decree; on the contrary, the process was issued with more caution and indulgence to him than was necessary, and with full and regular notice to his Attorney. That no inrolment of a decree, or judgment at law, can be set aside after it is entered up, except for fraud only, and that fraud relative to the act of inrolment itself: And if the Court should open an inrolment on any other suggestion than fraud, it would prove a great inlet to the multiplicity of suits; have great influence on the practice of all Courts of Equity; and render all property, so far as the same depends on the sanction of decrees and judgments, extremely precarious and uncertain. That the appellant's lunacy, or pretended incapacity, was no reason at all on which to ground the relief he now prayed, even if the truth of the fact was indisputably clear; for neither the Court or the respondent were at all apprised of it, nor was any indulgence asked on that account, or any objection made during the whole of the proceedings, nor until five months after the decree and the inrolment thereof. But there was really no foundation from the fact itself, for granting this relief: For, (1.) it was not pretended by the affidavits, that the appellant's disorder came upon him till the 27th of September, 1741; and it appeared, that he was served with the subpcena on the 14th of March preceding, and sued out a commission for taking his answer, on the 16th of July, 1741; so that he had above half a year after the subpcena served, and near four months after his suing out the commission, to put in his answer, before the time of his pretended insanity. (2.) All the affidavits produced on the appellant's behalf, allowed him to have had intervals of sanity, during which he might have put in an answer; and though these intervals were said to be short, yet that was a very uncertain mode of expression; and the Court could not know with certainty, the continuance of them. But the aid attempted to be drawn from these affidavits, was at once removed, by an act of the



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appellant himself, during the time that they spoke of most notorious insanity: For, on the 12th of *May*, 1742, when the appellant was alledged to have been insane, and before the issuing of the Serjeant at Arms in this cause, he swore an answer to a bill in the Court of Chancery of *England*, touching the same property that was in question in this cause; and which answer was evidence of the highest nature, and wholly invalidated the consequences endeavoured to be drawn from these affidavits: And it was certainly too much for the Court to say, that the appellant, who it appeared had intervals long enough to answer the *English* bill, had not intervals long enough to put in his answer to the *Irish* bill, or to make a short affidavit to stop process; for if either he or his agents had made an affidavit of his not being capable, the Court, on a proper application, would have enlarged the time for answering. (3.) The appellant himself had not sworn any affidavit of his being wholly ignorant of these proceedings being carried on against him, or of his being incapable, notwithstanding his lucid intervals, of putting in his answer; and he surely was not so far disabled, but that he might have applied by his agent to stop the process. That the answer now desired to be received, was taken under a commission, which issued on the 16th of *July*, 1741, and yet the answer was not sworn till the 20th of *May*, 1743, a year and three quarters after issuing the commission; and consequently was so out of date, that no answer, by any rule or practice, ought to be received thereon. Upon the whole, as the setting aside this decree under pretence of the appellant's insanity, might be attended with very extensive and mischievous consequences; and as this case was stripped of all the favourable and compassionate circumstances which the appellant would represent; tho' if it were not, it was much better that one private man should suffer, than an injury should be done to the public; it was hoped, that the appeal would be dismissed with costs.

ORDER  
reversed.  
Jour. vol. 26.  
p. 521.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of the 25th of *February*, 1743, should be reversed; and it was referred to the Remembrancer of the said Court of Exchequer, to tax the costs of the order of dismissal of the appellant's original bill, and any costs consequential thereto, and also the costs of the appellant's attempts



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tempts in the cross cause, and of all the proceedings in that cause from the time of issuing the first process of contempt; and that upon payment thereof by the appellant to the respondent, within a fortnight after the Remembrancer should have made his report of such taxation, and also upon the appellant's giving security, in such manner as the Court should direct, to answer costs in the original and cross causes, in case costs should be decreed against him; the sequestration should be discharged and the inrolment of the decree vacated, and the decree set aside; and that the order of the 11th of May, 1742, for dismissing the original bill, should also be discharged; and that the said original bill should be retained, and the appellant admitted to put in his answer in the cross cause; and that the Court should proceed in both causes, according to the course of the Court; and that the appellant should speed his original cause: And it was further ORDERED, that the said Court of Exchequer should give all proper directions for carrying this order into execution.

Dame *Mary Lake*, Widow, Executrix }  
and residuary Legatee of Sir *Bibye* } Petitioner.  
*Lake*, Bart. - - - - -

Case 64.

*Alice Mason*, Widow, and Executrix of }  
*Charles Mason*, - - - - - } Respondent.

14th April, 1746.

THE facts of this case having been already stated, upon occasion of the appeal in the year 1717\*; it is now only necessary to state the subsequent proceedings, which laid a ground for the present final determination.

\* Vide vol. I.  
p. 579.

Pursuant to the order made on hearing that appeal, the Master, on the 23d of February, 1731, made his report; whereby he certified, that on the 13th of September, 1707, there was a balance of 16,235*l.* 7*s.* 10*d.* due from *Mason* to the *Newells*; and that at the time of their failure, there was a balance of 12,433*l.* 9*s.* 1*d.* due to them from *Mason*.



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\* Vide Jour.  
vol. 25. p. 38.

Many exceptions were taken to this report, which were argued and re-argued, and several issues were thereupon directed to be tried; but both sides appealed from several parts of the orders made on that occasion: And upon the hearing of this appeal, on the 4th of *March*, 1736, some of those orders were reversed, and another issue was directed\*.

This issue being tried accordingly, the cause was heard on the 4th of *July*, 1739, upon the equity reserved, and for further directions, before the Lord Chancellor *Hardwicke*; when it was, amongst other things, ordered, that it should be referred to the Master to rectify the former report, according to the several directions then given.

Pending these transactions, *Joseph Newell* died, having made his will, and appointed *Benjamin Stoakes* and others executors; but *Stoakes* only proved the same, and the suits and proceedings were, therefore, revived against him. *Charles Mason* also died, having first made his will, dated the 10th of *September*, 1739, and thereby devised to his wife *Alice Mason*, her heirs, executors, administrators and assigns, all his real and personal estate; and appointed her sole executrix of his will, and she duly proved the same.

*Sir Bibye Lake* afterwards exhibited his supplemental bill, in the nature of a bill of revivor, against the said *Alice Mason*, widow, devisee and executrix of *Charles Mason*, and against *Richard Mason*, his son and heir: And the said *Alice Mason*, by her answer, insisted upon the devise made to her by the will; and that she was well entitled to all the real and personal estate which *Charles Mason* died seised or possessed of. But the said *Richard Mason*, by his answer, disclaimed all right or interest in or to the premises, or any part thereof. And upon hearing this supplemental cause on the 16th of *November*, 1741, it was decreed, that the former suit and decree should stand revived, and be carried into execution; and that the present parties should be at liberty to proceed in the account thereby directed, in the same manner as if the said *Charles Mason* had been living.

Accord-



Accordingly, the Master made another report, dated the 5th of *March*, 1743, and thereby certified, that the said *Charles Mason* was indebted to the *Newells* in 9120*l.* 0*s.* 8*d.* on the said 13th of *September*, 1707, after having credit for 5000*l.* which he, on that day, received from *Thomas Lake*, as the consideration of the indenture of mortgage in the original decree mentioned, and which was paid over by him to the *Newells*: And that the said *Charles Mason* was indebted to the *Newells* on the balance of accounts, in 3818*l.* 2*s.* 7*d.*

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Before this report was absolutely confirmed, Sir *Bibye Lake* died; having made his will, dated the 5th of *September*, 1743, and thereby appointed the petitioner his executrix and residuary devisee of all his estate; and soon after his death, she proved the will; and the proceedings in the causes, which became abated by the death of Sir *Bibye Lake*, being revived, the last mentioned report was absolutely confirmed: But before any further proceedings were had, the said *Benjamin Stoakes* died; whereupon letters of administration of the personal estate of *Joseph Newell*, unadministred by the said *Benjamin Stoakes*, with the will of *Joseph Newell* annexed, were granted to *George Payne*, Esq; in trust and for the benefit of his Majesty.

There was due to Sir *Bibye Lake*, by the Master's report of the 17th of *November*, 1715, 11,537*l.* 0*s.* 5*d.* and the same still remained due with interest from that time; and the petitioner, as his representative, was entitled to whatever benefit and advantage he had under the decrees and several orders made in these causes; which were now ripe for final judgment, upon the matters so reserved by the order of the 10th of *May*, 1717.

The principal reasons insisted on by Mr. *Mason*, upon the hearing of the first appeal for reversing the decree, were, that the 5000*l.* was a loan, not to Mr. *Mason*, but to the *Newells*, who gave their notes for that sum; that his mortgage was only a collateral security, and that he was not really indebted to the *Newells* at the time of such loan.

But it now appeared by the Master's report; that so far were the *Newells* from being indebted to *Mason* on the 13th of *September*, 1707, the time when the mortgage was made, that he

was



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was on that day indebted to them in 9120*l.* 0*s.* 8*d.*; and, at the time of their failure, on the 6th of *December* following, he was indebted to them in 3818*l.* 2*s.* 7*d.* so that there did not appear to be the least colour for saying, that his mortgage was only a collateral security for the *Newells*; especially, since at the time of the execution of the mortgage, the 5000*l.* lent was paid by Mr. *Lake* into *Mason's* own hands, and applied to pay part of his debt to the *Newells*; on the contrary, soon after the failure of the *Newells*, Mr. *Mason* owned this to be his own debt; and never pretended, that the *Newells* were any otherwise concerned than as security for him, till after the filing of the bill by *Thomas Lake*; there seemed therefore no reason to be offered against affirming the said decree, and giving the proper directions consequential thereto: And therefore the petition prayed, that that part of the decree, from which the said *Charles Mason* so appealed as aforesaid, might be affirmed.

To this petition Mrs. *Mason* put in an answer, admitting the several facts and proceedings therein stated; but insisted, that as the appeal brought by *Charles Mason* against the original decree of *December*, 1713, abated by his death, and the death of Sir *Bibye Lake*, and had not been revived by the respondent, nor had she brought any new appeal against the said decree, such appeal was at an end, and ought not to be farther proceeded in; But that the petitioner ought to have carried that decree, and the other proceedings in the Court of Chancery into execution, according to the method prescribed by the rules and orders of that Court; and that therefore, no judgment should now be given by the House in that appeal.

D. Ryder.

W. Murray.

W. Hamilton.

But on behalf of the petitioner it was submitted, that her present application was not only proper, but absolutely necessary, to have the cause finally determined: For Mr. *Mason* having appealed from that part of Lord *Harcourt's* decree, which charged his estate with 5000*l.* and interest, and directed the same to be sold for satisfaction thereof; and the House having reserved giving judgment on the point in question, till the account should be finished, and directed the parties to resort back again when that was done; there was a stop to all proceedings in the Court of Chancery, except such only as related to the account; and it was impracticable for the parties to proceed a  
step



step farther, without resorting back to the House for their determination. It was therefore immaterial, whether the appeal was revived by the respondent, or not; for the cause itself being revived in the ordinary way in the Court of Chancery, the petitioner had thereby a right to apply to the House, which she had done, and humbly hoped for their judgment upon the case.

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AFTER hearing counsel for the petitioner, and none appearing for the respondent, it was ORDERED and ADJUDGED, that so much of the said decree of the 9th of December, 1713, as was complained of in the said appeal, should be affirmed.

DECREE affirmed.  
Jour. vol. 26.  
P. 562.

Richard Evans,

Appellant.

Case 65.

William Blood and William Adams,

Gent. and Ann his Wife, Admini-

strators of Thomas Blood, a Lunatic,

deceased,

Respondents.

21st January, 1746.

THE Archbishop of Tuam being, in right of his fee of Kilfenora, seised of the lands of Glaninagh, Agbaglinny and Murrugh, in the county of Clare; by indenture of lease, dated the 18th of September, 1732, demised those lands to Thomas Blood, the lunatic, for a term of 21 years, at the yearly rent of 19l. 4s. and one shilling in the pound receiver's fees. And by virtue of this lease, Thomas Blood became possessed of the lands, which contained a large tract of ground, and were of the yearly value of 100l.

Thomas Blood, in the year 1733, became a lunatic; and in that and all the following part of his life, gave such remarkable proofs of his insanity, that altho' by intervals he might appear to be a person of understanding, yet he was well known and generally esteemed, in the places where he resided, to be a



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lunatic; and his friends and relations, and particularly the appellant's wife, who was a near relation to him, were all well acquainted with his insanity.

In the year 1735, this lunacy increased upon him, and he grew absolutely incapable of managing his affairs; and in the months of *January* and *February* in that year, was under the care of physicians; and was so much disordered in his senses, as to be confined and attended upon to prevent his doing mischief: Notwithstanding which, he committed many acts of violence and insanity. For having, in the said month of *February*, 1735, privately left the house of *Neptune Blood*, he went to the appellant's house, who took advantage of this disorder of mind, and prevailed upon him to execute an absolute assignment to the appellant of the said lease, dated the 16th of that month, and to sign a receipt for the sum of 400*l.* as the consideration of such assignment; altho' the lands, at that time, were worth, at a moderate computation, above 800*l.*; and altho' no more money was then actually paid to the said *Thomas Blood*, than 5*l.* 14*s.* the rest of the consideration (except 69*l.* 12*s.* 4*d.* alledged to have been paid to *Neptune Blood*, a mortgagee) being paid in promissory notes; some of which were made payable at future times, and the lunatic was prevailed upon to indorse over those notes to one *Thomas Blood* of *Tiremackbran*, who was a subscribing witness to the execution of the assignment, and a party to the whole transaction.

The lunatic having thus sold, and immediately given up the possession of these lands to the appellant, and his insanity continuing upon him; his relations found it absolutely necessary, for the preservation of him and his estate, to take out a commission of lunacy; and such commission having issued under the Great Seal of *Ireland*, he was, by an inquisition, dated the 15th of *October*, 1737, duly found and returned to be a lunatic at the time of the inquisition, and that he had been so since some time in the month of *December*, 1733; and on the return of this inquisition, the respondent *William Adams* was appointed his committee.

Soon



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Soon afterwards, applications were made to the appellant by the friends and relations of the lunatic, to quit this unjust and fraudulent bargain: But he insisting upon the benefit of it, a bill was, in *November*, 1737, filed in the Court of Exchequer in *Ireland* against him, in the name of *Robert Jocelyn*, Esq; his Majesty's then Attorney General of *Ireland*, and of the said *Thomas Blood*, the lunatic, by the respondent *William Adams*, his committee; setting forth the insanity of the said *Thomas Blood* from the year 1733, and that in the month of *February*, 1735, he was absolutely deprived of the use of his reason and understanding; and stating the fraudulent procurement of the assignment of the lease by the appellant, in manner before mentioned, for little or no consideration; and that he had, since the assignment, procured from the Archbishop a renewal of the lease; the bill therefore prayed, that the said assignment of the 16th of *February*, 1735, might be set aside; and that the benefit of the renewal, and an assignment of the new lease, on payment of the fine, might be decreed to the plaintiffs; and that the appellant might be compelled to account for the profits of the leasehold estate, which he had received since his pretended purchase.

The appellant, on the 27th of *April*, 1738, put in his answer to this bill; and thereby set forth, that he did not believe that *Thomas Blood* had become lunatic in 1733, or had continued so; but on the contrary, believed that in 1733, and for some years after, he had the full use of his reason, and was not at all deprived of it, other than what arose from excessive drinking; but did not believe he was deprived of his reason longer than whilst he continued to drink to excess; He denied that the said *Thomas*, at the time of executing the assignment, was under any incapacity of managing his affairs; but averred, that he had entered into the said contract with the appellant in the most deliberate manner, and had acted very cautiously in disposing of the said lands; that the bargain was fairly carried on in the appellant's house, in the presence of *Thomas Blood* of *Tiremackbran*, and *Dennis Kerrin*, who were witnesses to the assignment, and also in the presence of *Mary Blood*; and that at the time of the assignment, he paid the said *Thomas Blood* the vendor, 5*l.* 14*s.* and 69*l.* 12*s.* to *Neptune Blood*, who advised



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advised the said *Thomas* to give the appellant the preference of any other who might be disposed to bid for the lands: And that *Neptune Blood*, the uncle of *Thomas*, approved of the bargain; and that for the residue of the 400*l.* he had given *Thomas* several promissory notes, one for 26*l.* 2*s.* 3*d.* payable to him or order on demand; another for 100*l.* payable also on demand; a third for 100*l.* payable on the 24th of *June*, 1736; and a fourth for 100*l.* payable the 29th of *September*, 1736. And the appellant admitted, that he paid *Thomas* but 30*l.* on account of the said notes; but alledged, that he had made several payments to persons to whom *Thomas* had indorsed those notes, and particularly 254*l.* to *Thomas Blood* of *Tiremackbran*; and that 40*l.* and no more was due of the said 400*l.* And he likewise alledged, that from the 25th of *March*, 1737, he had set the lands at a clear profit rent of 54*l.* by the year.

The plaintiffs having replied to this answer, and issue being joined, witnesses were examined on both sides, and publication duly passed; and it was fully proved on the part of the plaintiffs, that the lands were of the yearly value of 100*l.* and that the lease, at the time of the assignment, was well worth 800*l.* or 900*l.* And it appeared by the witnesses examined on the part of the plaintiffs, who were no less than fourteen in number, all persons of undoubted credit, and who resided in the neighbourhood where *Thomas Blood* lived, from the year 1733, till his death, (some of whom were clergymen, and others the physician and apothecary who attended upon him) that from *December*, 1733, till *January*, 1735, his insanity increased; that his lucid intervals, during that time, were short; that he had been confined and bound, to prevent his doing mischief; that his mother and family were obliged to quit their habitation, and reside in another place for two or three months together, to avoid his fury: And that his disorders and acts of violence were so notorious and frequent, that he was known by the name of mad *Tom Blood*; and many particular acts of phrenzy and extravagance from 1733, down to the time of issuing the commission of lunacy, were proved by the witnesses. It was likewise proved, that in the months of *December*, *January* and *February*, 1735, his lunacy came upon him with greater violence than before: And that in *January*, 1735, he was so outrageously



rageously mad, that he broke loose about twelve of the clock in a frosty night from the house of one Mr. *Hickman*, where he had been under restraint, and the care of physicians, and travelled in the night some miles thro' the country in that rigorous season, to the house of *Samuel Banks*, without shoes or stockings, and without any covering but his night cap and breeches; that his feet and legs were much cut and bruised by so doing; and that he continued some time at that house in a very distracted condition, till he returned to Mr. *Hickman's*; from whence, on the 7th of *February*, 1735, he got away again, and went to the house of *Neptune Blood*, and staid there till the 11th; during which time, he complained of all the symptoms which usually attended his madness, and particularly of a disorder in his head; and that there was quicksilver in his head, and attempted, between the 7th and 11th of *February*, 1735, to run away bare-legged from the house of *Neptune Blood*; and that his behaviour there made such an impression on the wife of *Neptune Blood*, that she did not think herself safe in the house with him, during her husband's absence from home.

It likewise appeared in evidence, that on the 11th of *February*, 1735, the lunatic went to the appellant's house, and staid there till the 16th; but not one of the appellant's family or servants, who were about the lunatic during that time, were examined by the appellant; nor did the appellant attempt to prove any one instance of sanity during all that time, except the bargain of the 16th of *February*, 1735.

It was also proved, that *Thomas Blood* continued in this distracted condition, except with short intervals of sense, till the commission of lunacy issued against him; and that when his phrenzy was upon him, he was some times melancholy, at other times outrageous, and always, at the times of his phrenzy, regardless of his property, and capable of being imposed upon; and particularly, that he offered to give an apothecary a farm of considerable value, to cure him of a venereal disorder which he had contracted.

The witnesses to the assignment were, *Thomas Blood* of *Tiremackbran* and *Dennis Kerrin*, an ale feller in the district, of which the appellant was gauger; but the appellant did not think



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fit to examine *Thomas Blood* of *Tiremackbran*, tho' he drew the assignment and receipt; and tho', as the appellant alledged, he received 254*l.* of the purchase money upon notes indorsed to him by the lunatic. — The appellant, however, examined one *Mary Blood*, who said, that she was satisfied *Thomas Blood*, when he perfected the deed, was a man of sense, and that he appeared to her to have the use of his reason; but the same witness being cross examined, owned that he was called mad *Tom Blood*, and had committed several outrages; and that his mother and family quitted their habitation at *Boherfallagh*, and went to live at *Carosin*, occasioned by his misbehaviour; and that they continued to live at *Carosin* two months for that reason. And admitted, that on the day the deed was perfected, he complained his head was very bad; a symptom which, by the concurring testimony of many witnesses of undoubted credit, never failed to attend his fits of madness. — The other witness to the deed, *Dennis Kerrin*, was produced by the appellant to one interrogatory only, to prove the deed, and the appellant did not think fit to examine him, touching *Thomas Blood's* condition at the perfection of the deed; but this witness being cross examined, owned that *Thomas* then complained of a disorder in his head, which the witness believed proceeded from his old disorder or madness; and he also believed, that if he had not been disordered, he would not have sold his lands to the appellant, or any body else, in the manner he did: He said, that at times, on the day of perfecting the deed of assignment, *Thomas* appeared to be hippish, by hanging down his head, and sitting in a melancholy posture, from which the witness collected he was not right in his senses; and that at the house of *Neptune Blood*, the very day of the execution of the assignment, the witness called the said *Neptune* aside, and told him, that *Thomas* was mad, and desired him not to give up to him another lease of *Thomas's*, which was in his custody; for that if he did, he would dispose of it.

The appellant examined several witnesses to prove *Thomas Blood's* sanity, from 1733 to 1738, who were persons that only knew him as a common acquaintance, or had been in his company occasionally, and for some short time only; and many of them who were most conversant with him, on their cross-

examina-



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examinations owned, that from about *Christmas*, 1733, he had been mad by intervals, and was known and generally esteemed to have been so, and had committed many outrages on his nearest relations and others, and that he had been put under restraint; but said he was at other times a man of understanding and prudence.

After the witnesses had been examined, and publication had passed in the cause, in *July*, 1741, *Thomas Blood* the lunatic, died intestate and unmarried; whereupon letters of administration of his goods and effects were granted to the respondent *William Blood* his brother, and to the other respondent *Ann Adams* his sister; after a will which had been set up in favour of one *Thomas Hickman*, had been set aside by the *Pre-rogative Court*.

The respondents, in *Michaelmas* term, 1742, preferred their bill of revivor, to which the appellant appeared; and the time for answering being expired, the cause was revived by order, and upon the 2d of *May*, 1744, came on to be heard: And the appellant having objected to the bill of revivor, because his Majesty's Attorney General was not made a complainant, the objection was over-ruled; and the cause having taken up six days in hearing, the Court, upon the 7th of *June*, 1744, pronounced their decree, that the assignment made by *Thomas Blood* the lunatic to the appellant, should be set aside; and that the new lease, dated the 29th of *July*, 1737, taken by the appellant, should be in trust for the respondents, as administrators of the said *Thomas Blood*, and should be deposited with the Chief Remembrancer, or his Deputy; and that it should be referred to the officer to take an account of what had been paid by the defendant to *Thomas Blood*, or his order, on account of the assignment; or to the Archbishop of *Tuam*, for arrears of rent on the lease assigned by the said *Thomas Blood* to the appellant, or as a fine or fines for renewal of the lease: And that the appellant should account with the respondents for what he had made, or might have made, without his wilful default, of the lands in the said lease, from the time he came into possession of the lease; and the consideration of all other matters was reserved till after the report.

From



1740.

D. Ryder.

W. Murray.

From this decree the present appeal was brought; and on the appellant's behalf it was said to appear, by the depositions of a great many witnesses examined in the cause, and particularly the Archbishop of *Tuam*, that the said *Thomas Blood* was not a lunatic at the time of his executing the assignment to the appellant, or at any time before; but that on the contrary, he had the full use of his reason and understanding; that he generally managed and transacted all his own affairs, wrote several letters which appeared to be very sensible, gave receipts, executed and witnessed several deeds, and made several bargains, and granted leases; and that his own relations were so well satisfied of his sanity, that they took leases from him, which they would not have done, had they imagined him to be a lunatic. That several of the witnesses who had attempted to prove *Blood's* insanity, spoke only as to hearsay; others gave such improbable accounts, that very little regard ought to be paid to their testimony; and as to those who spoke in the most positive manner, it was remarkable, that the extravagant actions which they gave an account of, might be the effects of immoderate drinking, which *Blood* was sometimes addicted to; and which he fell into from some unhappy differences which subsisted between his mother and him, about the will and effects of his father; and the witnesses who spoke in the strongest manner in favour of the respondents, acknowledged that *Blood* often spoke and acted as rationally and sensibly as any other person whatsoever could do. That it was evident from the proofs taken in the cause, that the appellant did not purchase *Blood's* interest in the lands in a hasty manner, but at his own pressing instance and request, and with the privity and approbation of *Neptune Blood* his uncle, who assured the appellant, that *Thomas Blood* was determined to part with the lease, and to give the appellant the preference of it; so that *Thomas* proceeded in the sale in a deliberate manner, and the appellant was so far from taking any advantage of him, that *Thomas Blood* of *Tiremackbran* and *Mary Blood*, who were both of them his first cousins, were present at the time of executing the assignment; and *Blood* of *Tiremackbran* was not only a subscribing witness to the execution of it, but actually wrote it; and that most of it was dictated by *Blood* the pretended lunatic, which he could not have done, had he been at that time out of his senses. With regard to the value of the lands, it appeared,



peared, that at the time of the assignment, they were held by lease for the residue of a term which did not expire till *Lady-day*, 1737, at the yearly rent of 41*l*; that after the determination of that lease, the appellant let the lands for one year, ending at *Lady-day*, 1738, at the rent of 70*l*; and after that year, he let the same for 15 years, at the yearly rent of 75*l*. which was proved by several witnesses to be the full value: So that the 400*l*. given by the appellant for the purchase, there being only 17 years and a half of the term to come, was a full and adequate consideration; and it was observable, that *Blood* himself gave but a little while before only 440*l*. for the purchase of the whole term of 21 years. That the respondents having put their case singly upon the point of *Blood*'s insanity, and that he was a lunatic at the time of the assignment, and consequently [incapable of executing any deed; had made the question a mere legal question, which a Court of Equity ought not to have determined without a trial at law; and it was apprehended, that no instance could be found, where a Court of Equity had made a decree upon the foundation of absolute insanity, without such a trial. It was therefore hoped, that the decree would be reversed, and the respondents bill dismissed with costs.

On the other side it was contended, that the ground and foundation of the relief prayed by the original bill, was the insanity of *Thomas Blood*, at the time of his executing the assignment of the lease; and the undue advantages and measures which the appellant took and made use of in obtaining such assignment: And that the insanity of *Thomas*, and the impositions on the part of the appellant, were proved and made evident beyond a doubt, as well by the positive testimony of witnesses, and other proofs in the cause, as by the circumstances of the case, and the facts admitted and even stated by the appellant himself. That the insanity of *Thomas* was proved by a multitude of witnesses of undoubted credit, to have had its existence in 1733, and from that time to have gradually increased, with very short lucid intervals; sometimes exerting itself in the most outrageous acts of violence, and at other times in a deep melancholy; and one particular frailty always accompanied him during his disorder of mind, namely, that he was disposed to give away, or part with his estates for

J. Browne.  
T. Clarke.



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a trifle, and would be even pressing and importunate with his friends and acquaintance to accept of his property. That the insane state of mind which *Thomas* laboured under on the day of executing the assignment, was proved in the cause by convincing evidence; and confirmed by the cross examination of one of the appellant's own witnesses, who attested the deed. That the imposition and unfairness on the appellant's part was manifest, not only by the undue methods of obtaining the assignment, and the inadequateness of the consideration as mentioned in the deed itself, but by the appellant's defect in proving the payment even of that consideration; and by his not pretending to have paid the intestate at the time of executing the deed, any more than 5*l.* 14*s.* Besides, the appellant's own consciousness of *Thomas's* unfortunate state of mind, at the time of his executing the assignment, was so very remarkable, that of the two witnesses who attested the deed, he had ventured only to examine one; and even that one witness was examined only to the execution of the deed as an exhibit, and was not asked a single question as to *Thomas's* condition of mind when the deed was executed, tho' that was one of the principal facts in controversy. That under these circumstances, the directing an issue to try whether the intestate was sane or not, at the time of executing the deed, would have been entirely unnecessary and vain; the appellant not having been concluded by the finding of the inquisition, but having had a proper opportunity of proving *Thomas's* sanity, and having, instead thereof, fully proved his insanity: And there was still the less reason to expect any farther fruit or satisfaction from such an issue, as the intestate had died pending this controversy, tho' after the proofs were taken and published. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with exemplary costs.

DECREE  
affirmed.

Jour. vol. 27.  
p. 25.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents, 60*l.* for their costs in respect of the said appeal.

*William*



*William Plunket*, Gent. - - - Appellant. Case 66.

The Right Honourable *Henry*, Lord  
Viscount *Kingsland*, *Francis*, Lord Ba- } Respondents.  
ron of *Athunry*, and *Thomas Wakely*,  
Esq; - - - }

29th January, 1746.

**NICHOLAS**, Lord Viscount *Kingsland*, deceased, being seised of the lands and warren called *Conney-borough* of *Portmarnock*, in the county of *Dublin*; by deed, dated the 28th of *December*, 1723, demised the same to *Richard Cogan*, deceased, for 21 years, to commence from the 1st of *May*, 1724, rendering yearly a rent of 50*l.* and five dozen pair of rabbits. And after the death of Lord *Nicholas*, the respondent *Henry*, Lord Viscount *Kingsland*, his son and heir, by deed, dated the 25th of *November*, 1734, demised to the said *Richard Cogan*, the mill and a house and lands belonging thereto, part of *Portmarnock*, for 31 years from the 1st of *May* then last, at the yearly rent of 11*l.*

This warren and mill lay contiguous to the estate of *Luke Plunket*, the appellant's brother; a part of which estate, called *Carrick Hill*, the respondent *Wakely* held of him by a fee-farm grant.

In 1735, *Richard Cogan* the lessee died possessed of both these leases, and by his will, dated in *March*, 1728, and made before his taking the lease of the mill; he bequeathed his lease of the warren and lands held therewith, to his two sons *John* and *James*, they paying 10*l.* to his son *William*; but the testator made no disposition of the surplus of his estate, nor appointed any executor.

Upon the death of *Richard Cogan*, *John* and *James*, his sons, became entitled, by virtue of the will, to the lease of the warren of *Portmarnock*: But the other lease of the mill being undisposed of, vested in *Ann* his widow, and in *John*, *James*  
and



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and *William*, his three sons, and *Margaret Tiernan* his daughter, as his next of kin, by virtue of the statute concerning the distribution of intestate's estates; but no administration with the will annexed, was taken out by any of them.

From the death of *Richard Cogan*, in 1735, till 1740, the warren and mill were jointly held and occupied by the three brothers, *John*, *James* and *William Cogan*; and by an agreement, dated the 19th of *April*, 1740, it was agreed between them, that *John* and *William* should be jointly entitled in moieties to the profits of the warren and mill, and that *James Cogan* should have rent-free, a house and a garden on the warren, together with the liberty of keeping there two cows and two calves, and also liberty to dig and draw sand from off the warren, or any part thereof; which privileges he accepted, in satisfaction of his pretensions or right to the profits of the warren or mill. In consequence of this agreement, *John* and *William* continued in the possession of the warren, and killed the rabbits there, and jointly took and enjoyed the other profits thereof, till the death of *William Cogan* in *February*, 1741; and *James* continued in possession of the house, and from time to time enjoyed the other liberties and privileges, which he was entitled to under the agreement, after the death of *William*.

But the warren and mill being much too dearly rented, the *Cogans*, in 1740, declined in their circumstances, and the rent to Lord *Kingsland* run in arrear; and *William Cogan* having married the daughter of a tenant of Lord *Howth*, application was made, through his means, by Lord or Lady *Howth* to Lord *Kingsland*, to accept a surrender of the then existing lease, and to grant a new lease at a lower rent; and in order to enable *William Cogan* to make a surrender of the old lease of the warren, and complete an agreement for that purpose with Lord *Kingsland*, *John Cogan* and *Ann* his mother, in *January*, 1740, executed an assignment of their interest in the *Warren* to *William*, without any consideration; such assignment being intended only for the purpose of his obtaining a new lease, which was to be in trust for *John* and *James Cogan*, and was to be enjoyed by the three brothers, upon the terms of the before mentioned agreement: And before the execution, *John Cogan* declared and desired notice might be taken, that he did not absolutely



absolutely give up his right to his brother *William*; but was still to have his share of the lands and the benefit of the new lease, which *William* agreed to.

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*William Cogan* accordingly prevailed on Lord *Kingsland*, in the latter end of the year 1740, or the beginning of 1741, to agree to accept a surrender and to grant a new lease of the premises, or part thereof, for the term of 31 years, at a lower rent, upon payment of 61*l*. (the arrear of rent then due to Lord *Kingsland*); and on condition, that *Peter Daly*, Esq; his Lordship's father-in-law, who managed his affairs (without whose consent his Lordship never concluded any such agreements) would consent to and approve of such lease: But the *Cogans* not being in circumstances to pay the fine for the new lease, or to continue under the old one, and Mr. *Daly* never having approved of any such lease, the agreement was not carried into execution; nor was any new lease ever executed by Lord *Kingsland* to the *Cogans*, in pursuance thereof.

The respondent *Wakely* imagining, that the *Cogans* would not be able to continue tenants of the premises, had long before *November*, 1741, by the interest of the other respondent Lord *Athunry*, obtained a promise from Lord *Kingsland*, that he should have the refusal of a lease thereof, upon the expiration of the *Cogans*'s interest, or whenever they should quit the premises; and in consequence of such promise, was induced to lay out a considerable sum of money in buildings, and other improvements upon his own estate of *Carrick Hill*, which lay contiguous to it. And in *August*, 1741, *John*, *James* and *William Cogan*, informed the respondent *Wakely*, that they were not able to hold the premises, and pay the arrears of rent then due to Lord *Kingsland*; and therefore proposed to the respondent *Wakely*, (as they knew the premises lay convenient for him) to take the new lease, which was conditionally agreed for as aforesaid, and to pay the arrears of rent; and told him, that they believed he might get such lease at a rent of 40*l*. per ann.

The respondent *Wakely* having this offer made to him by the *Cogans*, and putting a confidence in the appellant, soon after informed him of this proposal, and of the promise he had



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before obtained from Lord *Kingland*; and asked the appellant's opinion of the value of the warren and mill, and desired him to use his interest with Lord *Kingland*, on his the respondent's behalf, to moderate the rent; the respondent *Wakely* not having the least suspicion, that the appellant intended to apply for a new lease himself.

The appellant, upon such conversation, promised his assistance in applying to Lord *Kingland*, but greatly undervalued the warren and mill; and having formed a design to get the new lease to himself, some time afterwards told the respondent *Wakely*, that Lord *Kingland* had fixed the rent of the new lease at 50*l.* *per ann.* and the fine at 50*l.* which was a false suggestion, and made only with a design to deter the respondent *Wakely* from the thoughts of applying further to Lord *Kingland*, and to furnish the appellant with a pretence of declaring to Lord *Kingland*, as he afterwards did, that the respondent *Wakely* had no further intentions of taking the lease.

The mill was supplied with water from the tides of the sea, which formed a large pond by dams, that kept in the sea water upon the ebb of the tide, 'till the return of it: And in September or October, 1741, the appellant (before he had obtained any promise of a lease from Lord *Kingland*) by the permission of the *Cogans*, who still continued in possession of the warren and mill, made several alterations in the mill-dam, and in the sluices and bridge belonging thereto, with design to try if he could drain eleven or twelve acres of the ancient mill-pond, in order to add the same to his brother *Luke Plunket's* estate lying contiguous thereto, altho' the mill-pond had been from time immemorial in the possession of Lord *Kingland's* family: And the appellant afterwards succeeding in this scheme, used all arts to procure a lease for himself of the mill and warren from Lord *Kingland*; and for that purpose assured his Lordship, that the respondent *Wakely* would not take a lease of the warren and mill at the rent of 45*l.* *per ann.* and a fine of 61*l.*; and that he, the appellant, had obtained the approbation and consent of *Peter Daly*, Esq; to his becoming tenant of the premises. And altho' both these affirmations were false, yet he thereby prevailed on Lord *Kingland* to make him some verbal promise of a lease, for a fine of 61*l.* and at the rent of 45*l.* *per ann.*



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ann. in case *Peter Daly* approved of such agreement. And the appellant, on the 4th of *December*, 1741, deposited with Lord *Kingsland* 40*l.* which, in case *Peter Daly* approved of such agreement, was to go as part of the fine; but could not prevail on Lord *Kingsland* to give any receipt for the same, as for a fine, or to sign any other writing, except a letter dated the 5th of *December*, 1741, to *James Goddart*, his steward, directing him to prepare a draft of a lease for the appellant, and to insert such restrictions therein as he and Mr. *Daly* should think proper; but in that letter no mention was made either of the lands to be let, or of any rent, term of years, or commencement of the lease.

The appellant being conscious, that he had obtained this verbal promise from Lord *Kingsland* by false suggestions, went the next day with Lord *Kingsland*'s letter to *Goddart* his steward; and having informed him of the terms of the agreement, offered to pay the remainder of the 61*l.* fine, and desired him to give a receipt for the same, as part of a fine for a lease of the coney-borough and mill of *Portmarnock*: But *Goddart* apprehending such receipt to be improper, 'till the agreement was fully concluded by the consent of Mr. *Daly*, absolutely refused to give any such receipt, or to receive the money as a fine, until he had acquainted Mr. *Daly* with the terms of the agreement, which he then had only from the information of the appellant; and *Goddart* also informed the appellant, that no agreement would be concluded, or lease made without the consent of Mr. *Daly*; whereupon the appellant consented to pay the money to *Goddart* as a deposit only, 'till the agreement should be concluded, and to accept a receipt from *Goddart*, to be accountable for it on demand; and was so far from looking upon his agreement as conclusive on Lord *Kingsland*, that he then, and often afterwards, requested *Goddart*'s friendship and interest with Mr. *Daly* and Lord *Kingsland*, for his getting a lease; and gave *Goddart* directions to prepare a draft of a lease, to be laid before Mr. *Daly*, according to the terms of the proposal he then informed *Goddart* he had made to Lord *Kingsland*.

In pursuance of these instructions, *Goddart* prepared part of a draft of a lease, and soon after acquainted Mr. *Daly* with the whole affair; but Mr. *Daly* was so far from approving of or consenting



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consenting to the lease, or any agreement with the appellant, that he immediately, upon seeing the draft, declared, that the respondent *Wakely* had a previous promise of a lease, and therefore must and ought to have a preference; and *Goddart* soon after informed the appellant of such his discourse with Mr. *Daly*, and offered to pay back the 21*l.* and the draft was never completed, nor was any lease ever executed to the appellant: And when Mr. *Daly* afterwards heard, that the appellant had informed Lord *Kingland* that he had his approbation to be tenant of the warren and mill, he declared such information absolutely false and groundless.

The respondent *Wakely* having received private information that the appellant was thus clandestinely treating with Lord *Kingland* for a lease of the premises, charged him therewith; and acquainted the other respondent Lord *Athunry*, and also the Earl of *Mount-Alexander*, with what had passed in relation to the lease, and desired them to use their interest with Lord *Kingland* to prevail with him to perform his promise, and make a lease of the premises to him upon the terms which had been offered to the *Cogans*. And the respondent *Wakely* being himself confined with sickness, the Lord *Athunry*, on his behalf, applied to Lord *Kingland* for a lease; who being satisfied of the justice of the respondent *Wakely*'s pretensions, did, with the consent and approbation of Mr. *Daly*, on the 1st of *January*, 1741, execute an article or minute of a lease, which was drawn by Mr. *Daly*'s clerk; whereby Lord *Kingland*, in consideration of 61*l.* paid by Lord *Athunry* as a fine, demised the premises to Lord *Athunry* for the term of 31 years, to commence from the 1st of *May*, 1745, (when the before mentioned lease of the warren was to expire) at the yearly rent of 45*l.*; and Lord *Athunry* then paid to Lord *Kingland* the whole fine of 61*l.*

This article, or memorandum, was taken by Lord *Athunry*, in trust for the respondent *Wakely*, and the 61*l.* was his proper money.

The respondent *Wakely* finding that the appellant was, by the permission of the *Cogans*, preparing to make considerable alterations in the mill and mill-dams; he, in order to prevent the appellant's



appellant's putting himself to any unnecessary expence about such repairs, upon the 11th of *February*, 1741, went with *Hugh Wilton* and *Rolleston Humphrys*, Esqrs. to the appellant, and informed him, that they were come to caution him against laying out any money in repairing the mill, because Lord *Kingsland* had let the mill and warren to Lord *Athunry*; and they then shewed him the minute of the lease before mentioned, and the appellant then said, he believed Mr. *Wakely* would take the mill and coney-borough if he could; and that he the appellant would also take them if he could: But he then owned, that he knew the respondent *Wakely* had been treating for the warren and mill for a considerable time past, and that he had consulted him some months before as his friend and neighbour, about taking the same: And the appellant being then asked, if he had obtained any lease thereof, or contract for a lease, he said he had a lease on certain conditions; but being desired to produce it, said he had not a lease, but a letter to Lord *Kingsland's* agent to draw a lease on certain conditions; and being then desired to produce the letter, he said it was a receipt for a fine; but he had it not there, nor would produce it till a proper time; but he made no pretence of a lease, letter, or receipt, till after he had seen the minutes of the lease to Lord *Athunry*.

The appellant, notwithstanding this notice, being resolved to get possession and a present lease of the premisses, and having seen the date of the minute of the lease to the respondent Lord *Athunry*, he obtained from *William Cogan* (who was then insensible and upon his death-bed, and very soon afterwards died) a deed, which was called a surrender, or assignment of his interest in the warren and mill to the Lord *Kingsland*, or the appellant; which surrender appeared to be antedated on the 8th of *December*, 1741, in order to give it a precedence to the minute of the lease to Lord *Athunry*, and the better to correspond with the agreement, pretended to be absolutely concluded with Lord *Kingsland*, upon the 4th of *December*. And being apprehensive, that his verbal treaty with Lord *Kingsland* would not be a sufficient title against Lord *Athunry*, the appellant, upon the 19th of *February*, 1741, prevailed on Lord *Kingsland* to sign a writing, importing an acknowledgement of the receipt of the 61 *l.* as a fine, and setting forth the terms of the verbal agreement pretended to have made upon the 4th of



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*December* preceding; but this writing was also antedated so as to bear date on the 5th of *December*, 1741, altho' actually signed on the 19th of *February*.

Notwithstanding Lord *Kingland* had inadvertently signed this antedated writing, he was so conscious that he had been imposed upon by the appellant, and that he was, in justice, bound by his agreement with Lord *Athunry*; that upon the 3d of *March*, 1741, he executed a lease of the premises approved of by Mr. *Daly*, pursuant to the minute before given to Lord *Athunry*, in trust for the respondent *Wakely*.

The appellant having, upon the death of *William Cogan*, which happened on the 23d of *February*, 1741, under pretence of the assignment or surrender from him, and the agreement with Lord *Kingland*, got into possession of all the premises (except the house, which *James Cogan* held under the before mentioned agreement with his brothers) and the term granted by the lease to Lord *Athunry* not commencing till the 1st of *May*, 1745, and the appellant daily committing great waste, both in the warren and mill; the respondent *Wakely* was advised to apply for letters of administration to *Richard Cogan* the father, with his will annexed, which had never been granted before, and which, by the consent of his widow and surviving children, were granted accordingly: And the respondent *Wakely* having thus become entitled to the subsisting leases of the warren and mill, as well as to the reversionary lease thereof before mentioned, he, in *Easter* term, 1742, brought two ejectments in the Court of King's Bench in *Ireland*, for the recovery of the possession of the premises; and the appellant, having taken upon him the defence of the ejectments, the respondent *Wakely* obtained a writ of estrepement against the appellant, to prevent his committing further waste on the premises, pending this suit. But before the respondent *Wakely* could obtain judgment in the ejectments, the appellant, upon the 15th of *June*, 1742, filed his original bill in the Court of Chancery in *Ireland*, against all the respondents; for an injunction to stay the respondent *Wakely's* proceedings at law, and for a specific execution of his pretended agreement with Lord *Kingland* for a lease of the premises.



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The respondent *Wakely*, upon the 21st of June, 1742, put in his answer to this bill; and thereby, after stating the several transactions before mentioned, he set forth, that *William Cogan* was not, in his life-time, entitled to the premises, and was therefore incapable of surrendering or assigning the same to Lord *Kingland*; that as to the writing, purporting to be such surrender, and dated the 8th of December, 1741, no opinion could be formed as to its execution by *William*, he being a marksman; and that when the appellant obtained such surrender, he imagined that the warren and mill were demised to *Richard Cogan* by one lease, and continued of that opinion till he was served with two ejectments, which apprised the appellant that there were two leases; and in consequence of this, the writing, purporting a surrender, was altered, and the words [a lease] appeared to have been turned into [leases] by erasing the *a*, and adding an *s*, in a different hand and ink from the rest, which was done through the whole deed, except in one place, where it seemed to have been over-looked.

The respondent Lord *Athunry* put in his answer upon the 18th of February, 1743, and thereby stated the circumstances attending the contract made between him and Lord *Kingland*, and the lease, as far as he was concerned therein, in the same manner as the respondent *Wakely*; that the fine of 61 *l.* was paid by him on the execution of the minute, and that Lord *Kingland*, some years before November, 1741, did, in presence of the Earl of *Mount-Alexander* and Lord *Howth*, promise to make a lease of the premises to the respondent *Wakely*, whenever *Cogan's* interest should determine: And admitted that he was only a trustee for *Wakely*.

Lord *Kingland* having also in October, 1744, put in an answer to the bill; the appellant replied to the several answers; and issue being joined, many witnesses were examined, both on the behalf of the appellant, and of the respondents *Wakely* and Lord *Athunry*; and publication having duly passed, the cause came on to be heard before the Lord Chancellor of *Ireland*, and having taken up several days in hearing, upon the 14th of December, 1745, his Lordship was pleased to direct a trial at law by a jury of the county of *Dublin*, upon the following issues; viz. Whether it was a part of the agreement between

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Lord *Kingland* and the appellant, for a lease of the warren and mill of *Portmarnock*, that Mr. *Daly*'s consent and approbation should be had to make such lease valid; and if such consent or approbation was part of the agreement, whether Mr. *Daly* gave such consent or approbation; and whether Lord *Athunry* or Mr. *Wakely* had, on or before the 1st day of *January*, 1741, any and what notice, of any and what agreement between the plaintiff and Lord *Kingland*, for a lease of the warren and mill of *Portmarnock*?

D. Ryder.  
W. Murray.

From this order or decree the appellant appealed; and on his behalf it was said to be erroneous: I. As to the merits of the case. II. As to directing the issues. And III. As to the matter of notice.

As to the merits it was contended, that the original agreement between the appellant and Lord *Kingland*, of the 4th of *December*, 1741, was a fair and honest agreement; the fine was an adequate fine, and the rent reserved the full rent, and much more than the respondent *Wakely* admitted the premises were worth, or than he would give for the same. That this agreement was not obtained by surprise, but with deliberation, the terms being first settled with *William Cogan*, the assignee of the original lease; and upon his inability to comply with them, his right was transferred to the appellant. That the respondent *Wakely* was early apprised of the treaty between *Cogan* and Lord *Kingland*, and did not then make the least mention of any previous promise to him of a lease of the premises in question, but endeavoured to dissuade and discourage *Cogan* from proceeding therein, by representing the premises as not worth more than 30*l. per ann.*; and that there was not the least ingredient of fraud or circumvention throughout the whole transaction, on the part of the appellant; as Lord *Kingland*, who was mostly concerned in point of interest, and knew the whole of the business, had fully declared and admitted, not only by his answer, but by a letter under his hand, which had been proved in the cause\*. That this agreement was no sooner

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\* This was a letter addressed to the appellant, in the following words:



sooner entered into than executed; the fine was immediately paid, the greatest part of it on the same day into Lord *Kingsland's* own hands, and the remainder on the next day to his agent, who received it by his order, and a receipt was afterwards given by his Lordship, specifying the precise terms of the agreement; directions were, at the same time, given by his Lordship to his own agent, for dispatching the leases; the appellant was put into possession, and immediately began to improve the estate, and paid his first half-year's rent on the very day it became due: And both the agreement and the improvements were public and notorious, being the general discourse of the whole country. That the surrender of the old leases by *William Cogan*, was made in favour of the appellant; and was expressly recited in the draft of the new lease, which Lord *Kingsland's* agent was preparing, pursuant to his Lordship's directions; and in order to the drawing of which, the appellant furnished him with the assignment and surrender from *William Cogan*, to enable him to compleat the lease. That from the whole complexion of the case, as well as from Lord *Kingsland's* answer, which was proved in the cause to have been settled by Mr. *Daly*, it appeared his Lordship never had the least intention to recede from his agreement with the appellant, without the appellant's previous consent to waive it; and that all the subsequent acts which his Lordship was prevailed upon to enter into, inconsistent with that agreement, were owing to a series of imposition in the other respondents, and particularly to their

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S I R,

Turvey, March 10th, 1743.

" I received your's this day, and am greatly surpris'd to hear, that Mr. *Wakely*  
 " says you impos'd on me about the coney-borough, for I am sure you did not;  
 " for you gave the same fine, and was to pay the same rent, that *William Cogan*  
 " agreed with me for: And when Lord *Athunry* spoke to me about the farm for  
 " Mr. *Wakely*, I said I had already promis'd it to you, and received a fine in  
 " consideration thereof: Upon which, my Lord told me, he would bear me  
 " harmless, and take all on himself, and even pay all the expences of any law-suit  
 " that could ensue: Upon which terms I gave him a lease. Who am,

S I R,

Your friend,

K I N G S L A N D."

" P. S. As for rent, I expect none, until all  
 " affairs are settled, and your costs allowed."



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assuring him, that the appellant had actually relinquished his claim to the lease; and all the acts thus done by him, were only intended to take effect, in case of the appellant's waiving the lease; tho' had his Lordship altered his intention in favour of the appellant, as he never did, it was not in his power, by those subsequent acts, to defeat his former agreement. That the appellant and the respondent *Wakely* were persons equally indifferent and unknown to Lord *Kingland*, and were mutually recommended to him at different times, but the latter, not till after the agreement with the former; and as the appellant had the prior recommendation, so he had the greater merit, which ought to weigh with every landlord; for he immediately agreed to give the full value of the estate, as adjusted by a third person; whilst the respondent *Wheatly* was endeavouring to depreciate and undervalue it, trusting to the interest he could make for obtaining a lease upon his own terms. That the subsequent minute or lease to Lord *Athunry*, was obtained by fraud and imposition, and with full notice of the appellant's prior title, his agreement, possession, and improvements; and as this notice would make his Lordship a trustee for the prior equity, so the respondent *Wakely*, even if he had no notice, ought not to be in a better condition than Lord *Athunry*, but to be subject to the same equity which the appellant had against his Lordship, as having had notice: As however, the respondent *Wakely* had likewise notice, he was guilty of a fraud in intermeddling; and a fraudulent lease or agreement is considered, in equity, as none. Besides, Lord *Athunry*'s offering to indemnify Lord *Kingland*, and the respondent *Wakely*'s offering to indemnify Lord *Athunry*, was strong presumptive evidence of their both having had notice of the appellant's prior agreement, and that they were conscious of pressing Lord *Kingland* to do an act which could not be justified.

As to the issues, it was said there was no foundation for directing either of them: For as to the pretence, that it was part of the appellant's agreement with Lord *Kingland*, that Mr. *Daly*'s consent and approbation should be had to make such agreement valid; and that this approbation not being had, the agreement was therefore void; there was nothing of this kind appeared in the cause. The agreement with the appellant was absolute, and not in the least subject to Mr. *Daly*'s approbation or consent,



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sent, nor was his consent one of the terms or conditions of the agreement; and it was incredible that it should, as he had no manner of interest or concern in the premises. And tho' as a gentleman of the bar, and Lady *Kingland's* father, his Lordship might pay him the compliment of taking his advice in the way of his profession, to settle his leases and see that they were properly drawn, with all the legal and usual restrictions; yet it could never be conceived, that he would tie himself up not to grant leases to any persons, or upon any terms, but such as Mr. *Daly* should approve of; for this would be, to throw the whole power over the estate into Mr. *Daly's* hands. But nothing of this kind was shewn with regard to other parts of his Lordship's estate, and therefore it was the more improbable to have been first and solely introduced into this particular lease; especially when it was considered, that this agreement with the appellant, was only a sort of transfer of the agreement which had been some time before made with *William Cogan*; and it was not pretended, that Mr. *Daly's* approbation was any part of the agreement with *Cogan*: Nor could it be imagined, that Lord *Kingland* would have received, or the appellant have paid the fine, if the agreement had been controulable, or liable to be varied or defeated, by the arbitrary will of a third person, who knew nothing of the matter; either with respect to the value of the estate, or whether the terms were reasonable or unreasonable. But if Mr. *Daly's* consent was, in fact, necessary, it appeared, by the proofs in the cause, that he approved of the agreement with the appellant; saying, he would always prefer a responsible tenant, who would pay most; and that things were too far gone for Lord *Athunry* or Mr. *Wakely* to expect a lease: And as there was not, nor had the respondents suggested any reasonable objection against Mr. *Daly's* giving his consent, if it was necessary; and as Lord *Kingland* was desirous that the appellant should have the lease, it was but equity to compel him to grant it, if he refused.

And as to Lord *Athunry* and Mr. *Wakely* having notice of the appellant's agreement before the 1st of *January*, 1741, when the minute was made to Lord *Athunry*, in trust for *Wakely*; his Lordship had, by his answer, expressly admitted, that upon his first application for a lease in favour of Mr. *Wakely*, Lord *Kingland* informed him, he had promised to let the premises

to



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to the appellant; and by two of Lord *Athunry*'s letters to Lord *Kingland*, which were proved in the cause, particularly the first of the 8th of *December*, which was within four days after the appellant's agreement, and long before the 1st of *January*, 1741, it appeared, that Lord *Athunry* was not only apprised of that agreement, but was endeavouring to get over it, and to gain a preference for the respondent *Wakely*. That it was admitted by Mr. *Wakely*, in his answer, that he had heard the appellant was applying for a lease for himself, and thereupon desired Lord *Athunry* to remind Lord *Kingland* of his promise of a lease to him; that it was the report of the neighbours, that the appellant had taken the premises; and that he was in possession thereof from the 1st of *November*. It was also proved, that the respondent had notice in *December*, 1741, of such the appellant's possession, and of his improvements; that he lived within a quarter of a mile of the premises, and daily walked or rode by the same, while the appellant was repairing. — But it was insisted, that in this case, the question whether the respondent *Wakely* had notice or not, was wholly immaterial: For it was admitted throughout, that he never was in possession, and consequently could have been at no expence in improvements; and as to the fine, that was ready to be repaid him; so that he could sustain no injury by the appellant's having the lease, and therefore notice to him, in a case so circumstanced, was altogether unnecessary. Upon the whole, as the appellant's was an equitable agreement, and carried into execution before the subsequent minute of *January*, 1741; as the setting this minute aside could be of no prejudice to the respondents, whereas the appellant would be very sensibly injured, if his agreement should be set aside; as the whole tenor of the respondents behaviour and proceedings, appeared to have been one continued scene of fraud and imposition; and that they took improper advantages of the credulity and confidence of Lord *Kingland*, in the assurances which they gave him of the appellant's being willing to relinquish his agreement; and as they were now endeavouring to impose a tenant on Lord *Kingland*, contrary to his inclinations, and in no respect, either as to rent, fine or solvency, preferable to the appellant; it was hoped, that the order appealed from would be reversed, the lease obtained by Lord *Athunry* set aside, and a lease of the premises decreed to the appellant, pursuant to his agreement.

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J. Browne.  
T. Clarke.

The respondent Lord *Kingland* did not appear, or make any defence to this appeal; but on behalf of the other respondents it was contended, that as to the issue, touching the consent of Mr. *Daly*, the appellant had no just reason to complain of it's being directed; it being fully proved in the cause, that Lord *Kingland* declared, he would never conclude any agreement for a lease of this estate, without such consent; and that in all his treaties for such lease, he constantly referred the parties to Mr. *Daly* for his approbation. That this was evident even in the instance of his agreement with the appellant, by his giving him no receipt for the 40*l.* alledged to have been paid at the conclusion of the verbal agreement; and the subsequent transactions of the appellant himself, all evidently shewed, that such consent was a previous condition, necessary to be obtained by him; and that neither he, or any of the other parties to that transaction, considered this pretended agreement as conclusive, or any thing more than a bare proposal, till the consent and approbation of Mr. *Daly* should be obtained. That the appellant was so conscious that this consent was a material fact, and necessary to be established, in order to support his verbal agreement; that he alledged in his bill, that Mr. *Daly* seemed pleased with this agreement, and that thereupon *Goddart* prepared a draft of the lease, which he would not otherwise have done; and the appellant had (tho' unsuccessfully) attempted to prove Mr. *Daly*'s consent, in a conversation between him and the appellant and his Attorney, in the area of the Four Courts in *Dublin*.

Nor had the appellant any more reason to complain of the other issue, concerning notice; for if the respondents, before the perfection of the minute by Lord *Kingland* to Lord *Athunry*, had no notice of any absolute agreement between Lord *Kingland* and the appellant, no decree ought, according to the rules of equity, to be made against them in favour of the appellant; even supposing his behaviour had, in other respects, been fair and unexceptionable, they having obtained the legal estate, and being, in such case, purchasers for a valuable consideration. Besides, both the respondents had, in their answers, fully denied notice of any title in the appellant, until after the perfection of the minute; except that they had heard of Lord



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*Kingland's* having been prevailed upon to make a verbal promise to let the premises to the appellant, provided Mr. *Daly* approved thereof; but that they had at the same time heard, that Mr. *Daly* had absolutely refused his approbation; and that such promise had been obtained from Lord *Kingland* by surprise and misrepresentation: And these answers stood uncontradicted by any evidence on the part of the appellant. That the right of the respondent *Wakely* could not be any way affected by the appellant's agreement with Lord *Kingland*, unless the same was absolutely conclusive, and the terms of it certain and reduced into writing, before the agreement between Lord *Kingland* and Lord *Athunry* was made; parol agreements relating to lands, being void by the *Irish* statute of frauds, 7 Will. III. But such agreement was so far from being clearly made out by the appellant, so as to enable the Court to found any decree thereon, without directing these issues; that both from the charges in his bill, and the proofs in the cause, his parol promise from Lord *Kingland*, appeared to be uncertain as to the nature and terms of it, and at most but a conditional agreement, depending on Mr. *Daly's* subsequent consent. That most of the appellant's written evidence was antedated, and was procured after he had seen the minute from Lord *Kingland* to Lord *Athunry*, in trust for Mr. *Wakely*; with a fraudulent design to gain a priority, and defeat that written agreement; and with an intent to make an unjust advantage even of Lord *Kingland*, by draining eleven acres of the mill-pond, and adding them to his brother's estate: And the appellant's behaviour throughout the whole transaction had been such, as might possibly have been sufficient to have given the respondents an equity against him; but could by no means furnish him with any colour of equity against them, to take away their legal right, accompanied with a prior and superior equity.

DECREE  
affirmed.  
Jour. vol. 27.  
P. 32.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order or decree therein complained of, affirmed.

Ann



Case 67.

*Ann Rotheram*, Widow, one of the Sisters and Coheirs of *Richard Bentball*, deceased, *Elizabeth Bell*, Widow, and *John Turner* and *Sarah* his Wife, which *Elizabeth* and *Sarah* were Daughters and Coheirs of *Elizabeth Langley*, deceased; the other Sister and Coheir of the said *Richard Bentball*,

*Ralph Browne*, *Mary Browne*, *Edward Browne* and *Elizabeth Browne*, an Infant,

Appellants.

Respondents.

25th March, 1747.

THERE having been, for many years, a great intimacy and friendship between the said *Richard Bentball* and one *Elizabeth Browne*, his kinswoman, of whose fortune, he, for many years, had the disposition and command; he, on the 28th of July, 1717, made his will; and after reciting, that he stood indebted to his loving friend and kinswoman Mrs. *Elizabeth Browne*, spinster, in 1050*l.* or thereabouts, for the greater part of which money she had no security; he therefore, as well in consideration thereof, as of the great love, affection and kindness which he bore to her, devised to her all his personal estate, and the estate in question, for her life.

Afterwards, by indentures of lease and release, dated the 18th and 20th of October, 1718, the release being quadruplicate, and made between the said *Richard Bentball* of the first part, the said *Elizabeth Browne* of the second part, *John Matthews*, Clerk, of the third part, and *Richard Alport*, *Henry Crumpton* and *Thomas Weld* of the fourth part; reciting, that the said *Richard Bentball* stood indebted to *Matthews*, as surviving executor of *Ralph Browne*, deceased, in the principal sum of 1000*l.* secured by a recognizance, in nature of a statute-merchant;



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merchant; and that the premises after mentioned stood charged by mortgage with 1200 *l.* payable to *Thomas Lyfter*; and also reciting, that he then stood indebted to the said *Elizabeth Browne* in 1050 *l.* upon an account stated, bearing even date with the release; and that the said *Richard Bentball* and *Elizabeth Browne* had agreed, that the premises therein mentioned, and the equity of redemption thereof, and all his interest therein, subject to the payment of the said sums of 1200 *l.* and interest, and 1000 *l.* and interest, should, in consideration of the said sum of 1050 *l.* be granted to the use of the said *Elizabeth Browne*, in manner after mentioned: It was thereby witnessed, that in consideration of the said sum of 1050 *l.* so due to the said *Elizabeth Browne*, and of 5 *s.* paid by the said *Alport* and *Crompton*; the said *Richard Bentball* did convey the manor of *Bentball*, and other lands therein mentioned, to hold to the said *Alport* and *Crompton* and their heirs, to the use of the said *Elizabeth Browne* for life; remainder to the said *Alport* and *Crompton*, and their heirs, upon trust to preserve contingent remainders; and after the decease of the said *Elizabeth Browne*, then as for and concerning all the premises, or such part thereof as the said *Elizabeth Browne* should think proper, to the use of the said *Alport* and *Crompton*, and their heirs, during the life of such person only, as the said *Elizabeth Browne*, by any writing or writings to be executed by her in the presence of two or more credible witnesses, or by any writing purporting a last will and testament, to be by her executed in the presence of three or more credible witnesses, either absolutely or conditionally, should direct, limit and appoint, in trust, and to and for the sole use and behoof of such person so to be named; and for want of such appointment, and as to such part whereof there should be no appointment made, and also as to what the said *Elizabeth Browne* should have made an appointment of as aforesaid, from and after the death of such person for whose use and benefit the said *Elizabeth Browne* should make such appointment; to the use of the said *Thomas Weld*, his executors, administrators and assigns, for 500 years; to raise portions for the daughters and younger sons of the said *Elizabeth Browne*, not exceeding 1000 *l.* to be raised and disposed of as she should by writing appoint; and subject thereto, to the use of the heirs of the body of the said *Elizabeth Browne*; remainder to the use of such person or persons, his,  
her



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her and their heirs, and for such estate and estates, and in such manner and form as the said *Elizabeth Browne*, whether sole or married, and with or without the consent of any husband she should marry, should by any writing, or by her last will in writing, to be executed in presence of three or more credible witnesses, either absolutely or conditionally, direct or appoint, and chargeable with any sum not exceeding 1000*l*; and it was thereby agreed, that every appointment made by *Elizabeth Browne*, by virtue of the powers therein contained, might from time to time be revoked, and a new appointment made; and for want of such appointment, then to the use of the said *Elizabeth Browne*, her heirs and assigns for ever. And in this indenture was contained a proviso, that in case the said *Elizabeth Browne* should at any time afterwards, be minded to sell any part of the premises, towards satisfaction of all or part of the said sums of 1200*l*. and 1000*l*. and interest; it should be lawful for her, whether sole or married, and with or without the consent of any husband she should have, to sell the inheritance of such part of the said premises as should be needful for that purpose; and after payment of the money to be raised by such sale, in discharge, or towards discharge of the said sums and interest; that from thenceforth the premises to be sold should enure, and the said *Alport* and *Crompton*, and their heirs, should be seised thereof, to the use of such purchaser or purchasers and their heirs.

Mrs. *Browne* afterwards paid off the 1000*l*. to *Matthews* and the 1200*l*. to *Lyster*; and took assignments of those debts to trustees, to keep the securities subsisting.

By deed poll, dated the 3d of *November*, 1718, executed by the said *Elizabeth Browne*, reciting, that by the said deed of settlement, she was entitled to the reversion and inheritance of the premises, to her and the heirs of her body; and for want of such issue, to the use of such persons as she should appoint; and for want of such appointment, to herself in fee; she, the said *Elizabeth Browne*, in pursuance of all and every the powers reserved to her for that purpose by the said recited indenture, did, by the said deed poll, executed in the presence of three witnesses, appoint, limit and grant all the said premises, and the reversion and reversions thereof, expectant on her death,



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in case she died before her intermarriage with the said *Richard Bentball*, unto him, his heirs and assigns, for ever; chargeable with the payment of 300*l.* to her brother *John Browne*, 200*l.* to her brother *Ralph Browne*, and 200*l.* to her sister *Mary Browne*: But in case the said *Richard Bentball* married her, then she declared that the said appointment, and every thing therein contained, should be void.

By another deed poll, dated the 11th of *March*, 1719, executed by the said *Elizabeth Browne* in the presence of three witnesses, reciting the indenture of the 20th of *October*, 1718, and the last mentioned deed poll; she, the said *Elizabeth Browne*, for good and valuable considerations, and in execution and performance of the power reserved to her in and by the said indenture of release, did appoint, limit and direct, that all the said premises should, after her decease, be held and enjoyed, and should remain, continue, and be to the use of the said *Richard Bentball*, for life: And she did thereby assign and set over all the said premises to the said *Richard Bentball*, and his assigns, for his life; and after the several deceases of her and the said *Richard Bentball*, then to the heirs of the body of the said *Elizabeth Browne*, lawfully to be begotten; remainder to the use of her brother *John Browne*, and the heirs of his body lawfully to be begotten; upon condition that the said *John Browne*, his heirs, executors, or assigns, should, within twelve months after the decease of the survivor of them the said *Richard Bentball* and *Elizabeth Browne*, in case of her death without issue, pay 500*l.* to her sister *Mary Browne*, and 500*l.* to her brother *Ralph Browne*, in manner therein mentioned; and in default of issue of her brother *John Browne*, to the use of her brother *Ralph Browne*, and the heirs of his body; chargeable with the payment of the further sum of 500*l.* to her said sister *Mary Browne*, as therein mentioned; remainder to the use of her sister *Mary Browne*, and the heirs of her body; remainder to the use of such person and persons for such estate, and under such provisos, conditions and limitations, as she, whether sole or married, with or without the consent of any husband she should happen to have, should, by any deed or writing, or by her last will, executed in presence of, and attested by three credible witnesses, devise, direct, limit, declare, or appoint the same. And in this deed poll was contained



tained a proviso, that it should be lawful for the said *Elizabeth Browne*, at any time during her life, by any writing to be executed by her in the presence of two or more witnesses, to revoke and disannul all or any part of the use and uses, estate or estates, provisos and conditions, by her thereby created, limited, or intended; and that the same should, at her will and pleasure, be void and of no effect, to all intents and purposes, and of no more signification than if the said deed poll had never been made.

On the 5th of May, 1720, *Richard Benthall* died unmarried and without issue.

In *Trinity* term, 1721, *Elizabeth Browne* levied a fine of the estate in question, and continued in quiet possession thereof for 15 years and upwards: But in *Michaelmas* term, 1736, the appellant *Ann Rotheram* and *Elizabeth Langley*, as sisters and coheirs of the said *Richard Benthall*, brought their bill in the Court of Chancery against the said *Elizabeth Browne*; charging, that the said *Richard Benthall* proposed to mortgage the premises to her for a term of years, or for her life, or otherwise to secure the said 1050*l*; and that a treaty of marriage being on foot between them, they agreed that a deed should be prepared to be a security for the said 1050*l*. if the marriage did not take effect, and to be a provision for her and the issue of that marriage if it did take effect; and that he left it to the said *Elizabeth Browne* and her brother, to get such deeds prepared as would answer that intent, and to employ an Attorney, as they thought fit; that by their direction and management, deeds were accordingly prepared; and that in confidence of their being drawn pursuant to the agreement, the said *Richard Benthall*, without consulting any person learned in the law, but such as were employed by and in the interest of the defendant, executed the said deeds of *October*, 1718; that the said conveyance was obtained from the said *Richard Benthall*, by fraud and undue influence; and that in all events the same could be considered only as a security for the said 1050*l*. And therefore, the bill prayed an account of the said *Richard Benthall*'s personal estate, and to have the title deeds relating to his real estate delivered up, and a reconveyance thereof.

To



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To this bill Mrs. *Browne* put in a plea and answer; and as to so much thereof as sought to impeach her title to the estate in question, or any account of the rents thereof, she pleaded the said several deeds, fine and non-claim: And as to so much of the bill as prayed any account of *Richard Bentball's* personal estate, she pleaded his will. And by her answer, denied all circumstances of fraud and imposition on the said *Richard Bentball*, or that it was his intention, in case the intended marriage between them did not take effect, that she should, upon payment of the 1050 *l.* be considered as a trustee of the estate in question, for the said *Richard Bentball* and his heirs.

On the 11th of *November*, 1737, this plea was argued, and over-ruled, with regard to the real estate; and directed to stand for an answer as to the personal estate, with liberty to except; save as to the account of the personal estate.

The said *Elizabeth Browne* afterwards suffered two recoveries of the estate in question; and by two deeds executed by her, the one dated the 2d of *May*, 1737, and the other the 24th of *January*, 1737, the uses of those recoveries were declared to herself in fee.

In *March*, 1737, Mrs. *Browne* made her will; and thereby devised the estate in question to her brother *John Browne*, and his heirs, chargeable with a legacy of 500 *l.* to her sister *Mary Browne*, and made him executor; and on the 9th of *April*, 1738, she died.

Upon her death, the appellant *Ann Rotheram* and the said *Elizabeth Langley*, brought their bill of revivor, against the said *John Browne* and against *Edward Browne*, as the eldest brother and heir at law of the said *Elizabeth Browne*, and against *Ralph Browne* and *Mary Browne*, as claiming sums of money out of the said estate; to revive the suit, and have the benefit prayed by their original bill. And soon afterwards, they filed a supplemental bill against the same persons, stating the recoveries suffered by *Elizabeth Browne*, after putting in her plea and answer to the original bill, and the execution of the deeds declaring the uses thereof; and insisting, that no legal estate passed by those recoveries; or if any did pass, that it was only



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in trust for, and ought to be reconveyed to them: And the said *Edward Browne* afterwards dying, the plaintiffs filed a bill of revivor against *Ralph Browne*, jun. as his eldest son and heir at law.

On the 6th of *June*, 1741, the cause was heard before the Lord Chancellor *Hardwicke*; and on the 16th of the same month, his Lordship was pleased to decree, that the bill of the appellant *Ann Rotheram* and the said *Elizabeth Langley*, so far as it sought to set aside the conveyances, or any of them, under which the respondents claimed the estate in question, or to have a reconveyance thereof, on the head of imposition, want of consideration, or mistake, should be dismissed without costs: But as to any other relief sought by the bill, it was ordered, that the same should be retained for a year, and the plaintiffs in the suit were to be at liberty within that time, to bring an ejectment: And it was likewise ordered, that all the deeds and writings relating to the premises in question, which were in the custody or power of any of the parties, should be produced before the Master, upon oath, on or before the last day of *Michaelmas* term then following; and any of the parties were to be at liberty to inspect the same, and take copies thereof: And in case such ejectment should be brought, such of the deeds and writings as either side should give notice for, were to be produced at the trial; and on such trial, the defendants in the cause were not to insist on any incumbrances, or satisfied terms, or the statute of limitations; and they were likewise to admit on such trial, that the several sums of 300*l.* 200*l.* and 200*l.* mentioned in the deed poll of the 3d of *November*, 1718, were paid within 12 months after the said *Richard Bentham's* death, according to that deed, to the end that the title might come properly in question; and after the trial, any of the parties were to be at liberty to apply to the Court: But in case no such trial should be had within the said time, it was ordered, that the bill should be wholly dismissed without costs.

Pursuant to this decree, the respondents, and the persons under whom they claimed, produced all the deeds in their custody for the appellants inspection; and the said *Elizabeth Langley* dying soon afterwards, the appellant *Elizabeth Bell*, together with *John Bell* her husband, since deceased, and the



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appellants *John Turner* and his wife, on the 10th of *December*, 1741, filed their bill of revivor to revive the suit: But the appellants not thinking proper to bring any ejectment, suffered their bill to be absolutely dismissed, on the 8th of *July*, 1743.

*John Browne*, the devisee under the will of the said *Elizabeth Browne*, afterwards died; having made his will, dated the 8th of *July*, 1741, and thereby devised the estate in question to the respondent *Ralph Browne*, in tail; with remainder to the said *Mary Browne* in tail; with remainder in fee to the respondent *Edward Browne*: And *Ralph Browne* the younger, the heir at law of the said *Elizabeth Browne*, having also died, the respondent *Elizabeth Browne*, the infant, was his heir at law.

W. Murray.

T. Clarke.

T. White.

The appellants conceiving the decree to be erroneous, appealed from it; insisting, that no other consideration appeared on the face of the deed of *October*, 1718, than the sum of 1050*l.* which was by no means an adequate and valuable consideration for the absolute purchase of the estate in question, proved to be 500*l.* a year, and worth 12,000*l.* to be sold, and was only incumbered with a mortgage of 1200*l.* and 1000*l.* due on a statute-merchant; and even this 1050*l.* the only expressed consideration, was so far from being paid, or even allowed to *Richard Bentball* at the time of executing the conveyance, that he, on that very day, gave *Elizabeth Browne* a promissory note for the same sum, payable on demand; and there was no sufficient proof in the cause of any other consideration, and if there had, no such proof ought to be admitted as evidence. That these deeds absolutely divested *Richard Bentball* of all his right to the estate; and as soon as they were executed, left him destitute even of a maintenance, and under the precarious and unhappy situation of being dependent on *Elizabeth Browne*, or in case of her death, on her representatives, for a subsistence; which could certainly never be his design or intention. That if framing the deeds in this manner, and so as to have this operation, was the effect of accident or mistake, they ought in equity to be rectified; but if it was not the effect of mistake or accident, it was an imposition upon *Richard Bentball*: And wherever deeds are framed either through accident or design, materially and substantially



stantially different from the real intent of any of the parties, a Court of Equity ought to extend its aid; the giving relief in such cases, being one of the chief branches of its proper and original jurisdiction.

On the other side it was said, that the appellants case seemed to depend either upon a title at law, derived under the deed poll of the 3d of November, 1718; or upon a right to be relieved in equity against the deeds executed by *Richard Bentball*, under which the respondents derived a title: But it was insisted, that the appellants had no legal title to the premises; because the appointment of the 3d of November, 1718, in favour of *Richard Bentball*, was either duly revoked by the deed of the 11th of March, 1719, by virtue of the original powers reserved to *Elizabeth Browne* in the deed of October, 1718; or else, the estate and interest derived to *Richard Bentball* under that appointment, was duly barred by the fine and non-claim, and the recoveries suffered by *Elizabeth Browne*; she having a legal power to bar any interest or estate in remainder, which lay behind the estate tail, and thereby to make herself tenant of the premises in fee simple. That the legal right to the premises being properly triable at law, and the decree having given the appellants liberty to bring an ejectment, and having removed all impediments to a trial of that right, upon the merits of the case; the appellants had a proper opportunity of trying their title at law, if they thought fit; but having declined such trial, and suffered their bill to be wholly dismissed, they had no just reason, either to complain of the decree, or to expect any further indulgence. And as to any right in equity, to be relieved against the deeds under which the respondents claimed; it was contended, that there was no just foundation for any of the objections which had been made.

D. Ryder.

J. Browne.

The first pretence set up for this purpose was, that the deeds of October, 1718, were left to be prepared, and were prepared by the direction or management of *Elizabeth Browne*, or her brother, or their agents; and executed by Mr. *Bentball*, without consulting any person, but such as were in their interest, and were obtained from him by unfair means and influence. — But none of these allegations were supported by proof; on the contrary, it appeared from the evidence, that

Mr.



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Mr. *Bentball* was not only a person of very good sense, but had been bred to the law, and was conversant in business; that he himself gave the instructions to his own agent, whom he usually employed in his affairs; that the whole transaction was his own voluntary act, begun, carried on and compleated with deliberation, and perfect knowledge of what he did, and without the least ingredient of fraud or undue influence whatsoever; and that after the execution of these deeds, they were left in his custody.

The next pretence was, that the deeds were proposed only as a security for the 1050*l.* and that Mr. *Bentball* was to have the estate subject thereto, if the treaty of marriage did not take effect; but if it did, then the deeds were to be in the nature of a marriage settlement; and that Mr. *Bentball* executed them in confidence, that they were drawn pursuant to such proposal and agreement. — But there was no proof of any such proposal or agreement; it was contrary to the plain words and manifest intent of the deeds; and there was no provision, by covenant or otherwise, for a redemption of the premises, on repayment of the 1050*l.* And tho' there was an account stated, and a note signed for this sum, yet that was done only to evidence the debt, which was immediately discharged by the conveyance: The deeds took no notice of any marriage, but were formed upon a plan, which could not answer either of these purposes; nor did the circumstances or proofs in the cause shew, that the parties intended the deeds to have this particular effect or operation; but the whole was calculated to put the estate in Mrs. *Browne's* power, at all events.

Still it was objected, that the 1050*l.* was not an adequate consideration for the purchase of the equity of redemption of this estate; that therefore the deeds must be considered as a security only for that sum, and could never be intended to put the estate in Mrs. *Browne's* power at all events; and that the deeds must have been so drawn by mistake. — To this it was answered, that the deeds were not founded upon a strict purchase for a valuable consideration, but were of a mix'd nature, partly founded on a consideration, and partly voluntary; proceeding from friendship and affection to Mrs. *Browne*, which



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were the joint motives of the settlement. That Mr. *Bentball* meant and intended to settle this estate on her, and to put it in her power at all events; that he always understood he had done so; and as she had entirely trusted him with her whole fortune, without any security, he might be thereby induced to settle and put his estate into her power; which she afterwards owned with proper gratitude, by suffering him to receive the rents as long as he lived. That his knowledge of having divested himself of all power over the estate, appeared beyond contradiction, by his frequently declaring it to several persons, and upon various occasions; but particularly about six months before his death, when upon a tenant's applying to him for a new lease, he declared *it was out of his power; for he had settled it upon his cousin Betty Browne, and all the men in England could not take it from her; and upon further discourse, he declared she might give it to her brother, if she thought fit: And about three months afterwards, he again declared, that he had settled all his estate upon her; that all was too little; and that if he had as much more, she deserved it, and should have it all.* That from these and several other circumstances proved in the cause, it was evident that *Richard Bentball* knew he had settled his estate on Mrs. *Browne*, and had put it out of his own power, and intended so to do; and as there was not the least proof of any undue means in obtaining the deeds, there was no foundation for a Court of Equity to relieve the heir at law against them.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE  
affirmed.  
Jour. vol. 27.  
p. 87.



Case 68. The Right Honourable *Henry*, Earl of  
*Shelburne*, and *James*, Lord *Dun-* } Appellants.  
*kerron*, his Son and Heir apparent, }  
*Nicholas Biddulph*, Esq; - Respondent.

9th May, 1748.

**C**HARLES, Lord *Shelburne*, elder brother of the appellant the Earl, being entitled to the inheritance of the lands of *Logamarley*, otherwise *Annasclan* and *Ballyngown*, in the *King's County*, subject to the dower, or some interest for life of his mother *Elizabeth*, Lady Dowager *Shelburne*; he, together with his said mother, by indenture dated the 7th of *December*, 1692, granted and demised the said lands to *Henry Salmon*, his heirs and assigns, for the lives of the said *Henry Salmon*, *Henry Salmon* the younger, his son, and *Robert Hutton*; at the rent of 10*l.* a year for the first three years, and 15*l.* a year for the residue of the time: And Lady Dowager *Shelburne* and Lord *Charles* thereby covenanted with *Henry Salmon*, the lessee, his executors, administrators and assigns, that if, upon the death of either of the lives named in the lease, the said *Henry Salmon*, his executors, administrators or assigns, should be inclined to name a new life in the place of him so dying, they would, upon request, perfect a lease of the lands for a new life, under the same rents and covenants in the then lease; provided that the said *Henry Salmon*, his executors, administrators or assigns, should pay 15*l.* in consideration of such renewal, within three months next after such death, to the said Lady Dowager *Shelburne* and Lord *Charles*, their executors, administrators or assigns, or either of them.

This lease, by assignment, became afterwards vested in *Nicholas Biddulph*, the respondent's grandfather, to whom the said *Charles* Lord *Shelburne* by indenture, dated the 25th of *October*, 1694, also granted the towns and lands of *Rathbrobbin*, *Curragh* and *Bredagh*, with other lands lying in the barony of *Ballyboy* in the *King's County*; to hold to him, his heirs and assigns, for the lives of *Charity Biddulph*, wife of *Nicholas* the  
lessee,



lessee, *Francis Biddulph* his son and heir, (father of the respondent) and *Alice Biddulph*, eldest daughter of *Nicholas* the lessee, and the life of the survivors and survivor of them, and for and during the life and lives of such person or persons, as by virtue of the said deed should, from time to time, successively and for ever be added thereto, at the yearly rent of 80*l.* 10*s.* 6*d.* for the first six years, and the yearly rent of 103*l.* 3*s.* 10*d.* for the remainder of the term. And there was a covenant on the part of *Charles Lord Shelburne*, his heirs and assigns, for a perpetual renewal of this lease, by inserting a new life, in the room and stead of every life which should fail, from time to time, upon the lessee, his heirs or assigns, paying half a year's rent (according to the respective reservations therein contained, for that half year wherein such life should so cease or fail) over and above the annual rent reserved, and nominating a new life within twelve months after the failure of each of the lives then in being, or to be afterwards nominated. And *Nicholas Biddulph* thereby covenanted for himself, his heirs and assigns, to pay to the said *Lord Shelburne*, his heirs and assigns, from time to time, upon failure of every person for whose life the lease should be held, half a year's rent above the reserved rent, within twelve months after the failure of every such life: And if, upon failure of any life, he, his heirs or assigns, should not pay the fine within the twelve months, and nominate another life, it should be lawful for the *Lord Shelburne*, his heirs and assigns from thenceforth for ever, to refuse to add any other life in the lease; and after the failure of the lives then in being, the lease should determine. And the lessee also covenanted to lay out, within six years, 100*l.* in building a good farm-house and out-houses on the premises; and within the same term to inclose one acre, and plant it with fruit trees; and to plant, at least, 1000 trees of oak, ash, or elm; and sufficiently to ditch and quickset all the meres and bounds of the premises, and to maintain and keep the houses and improvements in good repair. And a letter of attorney was inserted in this lease for livery of seisin, which appears to have been delivered accordingly.

*Charles Lord Shelburne*, by another indenture, dated the 10th of *October*, 1695, also granted and demised to the same *Nicholas Biddulph*, but by the mistaken surname of *Bidwell*, the lands of  
Cullymore



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*Cullymore* in the said barony of *Ballyboy*, and *King's County*; to hold to him, his heirs and assigns, for the lives of *Nicholas* the lessee and *Charity* his wife, who, by mistake, was called *Dorothy Bidwell*, and *Francis Biddulph*, the respondent's father, therein also, by mistake, called *Francis Bidwell*, eldest son of the said *Nicholas*, and of the longer liver of them, subject to a rent of 10*l.* payable half yearly, free from taxes. And in this lease there were the like covenants, as in the last mentioned lease, for a perpetual renewal, on payment of a fine of half a year's rent, and on the nomination of a new life, within twelve months after failure of each life in the lease, or which should afterwards be nominated. And on this lease there likewise appears to have been livery of seisin; and the appellant, *Henry Earl of Shelburne*, was a subscribing witness thereto.

*Nicholas Biddulph*, in confidence of enjoying the benefit of these leases, and not in the least suspecting the title of Lord *Charles*, or his power to grant such leases, laid out very great sums of money in the improvement of the several estates thereby demised, and constantly paid the several rents reserved thereon to *Charles Lord Shelburne* during his life, and afterwards to the appellant the Earl.

*Charles Lord Shelburne* died in *April*, 1696, without issue and intestate; and upon his death, *Henry Earl of Shelburne*, his brother and heir, possessed his personal estate, and became entitled to several estates, of the yearly value of 1000*l.* and upwards, of which Lord *Charles* died seised in fee simple, and which descended to the Earl as his brother and heir at law. And he claiming title to the inheritance of the several estates comprised in the before mentioned leases, (subject to the jointure estate of the Dowager Lady *Shelburne*, in part of the lands) received the rents reserved upon those leases from time to time, as they became due; and in *Easter* term, 1697, the Earl levied a fine with proclamations, of the said demised estates.

Afterwards, by indentures of lease and release, dated the 15th and 16th of *April*, 1697, in consideration of a marriage then intended, and which afterwards took effect, between the Earl and *Arabella Boyle*, and of her portion; Lady *Shelburne* and the Earl limited and conveyed the estates comprised in the said



saïd leases, and the other estates which had descended to the Earl, as heir of his brother, to the use of the Earl and his heirs, till the marriage; and after the marriage, (subject to the jointure estate of the Lady Dowager *Shelburne*, in part of the lands in the *King's County*, and to a term of years therein created, in trustees, for securing a rent-charge of 300*l. per ann.* to *Arabella Boyle*, afterwards Countess of *Shelburne*, for her separate use) to the use of the appellant, the Earl of *Shelburne*, for life, without impeachment of waste; with remainder, as to part of the lands, to *Arabella Boyle* for life, for her jointure; with remainder, as to the whole, to the first and other sons of the appellant the Earl, on the body of the saïd *Arabella* in tail male; with remainder to the appellant the Earl and his heirs. In which release there was a power reserved to the Earl, after the death of the Lady Dowager, (who died soon after) to make leases of the premisses; and to his then intended wife, the Countess of *Shelburne*, after his decease, to make leases of such part as was contained in her jointure, for 21 years or three lives, at the best improved yearly value. And a covenant was therein contained, that the Earl was then seised of an absolute estate of inheritance in fee simple, and had power to grant and limit the estates according to that deed; and that the premisses should be and remain to and for the several uses and estates therein limited and appointed, and should be held and enjoyed accordingly, freed from all former incumbrances; other than and except the several leases then in being thereof, under the several rents thereon respectively reserved.

*Nicholas Biddulph*, after the death of *Charles Lord Shelburne*, continued in quiet possession of the saïd leasehold estates, and duly paid his rents to the appellant the Earl, till *March*, 1702, when he died intestate, leaving the before named *Francis Biddulph*, his son and heir, an infant of the age of twelve years; who thereupon became entitled to the saïd several leasehold estates, as special occupant; and *Charity Biddulph*, his widow, as guardian to her son *Francis*, before any rent became due, in pursuance of the covenant in the lease of the lands of *Cullymore*, within twelve months after the death of *Nicholas Biddulph*, tendered the fine due on his death, and nominated *John Biddulph*, the younger, another son of the saïd *Nicholas Biddulph*,



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*dulph*, as the life to be inserted in the lease in his stead, and demanded a renewal of that lease, according to the covenant. And *Alice Biddulph*, one of the lives named in the lease of the lands of *Rathbrobbin*, dying in *December*, 1735, *Francis Biddulph*, within twelve months after her death, named the respondent as the life to be inserted in that lease in her stead, and tendered the fine due upon her death, together with all arrears of rent, to *Andrew Kennedy*, the Earl's agent in *Ireland*, (his Lordship being then in *England*) and demanded a renewal of that lease, according to the covenant.

*Francis Biddulph*, the respondent's father, upon the respondent's marriage with *Patience Colley*, by indentures of lease and release, dated the 25th and 26th of *April*, 1736, in consideration of the marriage and portion, conveyed all the leasehold estates before mentioned to the use of the respondent for life, with several remainders over. And the respondent having become entitled to these estates under this settlement, and the appellant the Earl soon after coming into *Ireland*, the respondent waited upon his Lordship, and again applied for a renewal of the said several leases, and named the life of *John Biddulph* to be inserted in the place of the said *Nicholas*, the respondent's grandfather, in the lease of the lands of *Cullymore*, in pursuance of the nomination before made by *Charity Biddulph*, the respondent's grandmother, and named his, the respondent's own life, to be inserted in the lease of the lands of *Rathbrobbin*, in the place of *Alice Biddulph*; and he likewise named his own life to be inserted in the lease of the lands of *Logamarley*, in the stead of *Henry Salmon*, who was then also dead; and the respondent, at the same time, tendered to the Earl the several fines which had become due upon the several deaths before mentioned, together with all arrears of rent; but the appellant the Earl, tho' he had constantly received the rents reserved upon these leases from the respondent, and his father and grandfather, and had never questioned their validity, yet absolutely refused to accept the fines, or execute any renewals of the leases; alledging, that *Charles Lord Shelburne*, the lessor, being only tenant in tail of the demised lands, under a settlement made in the year 1679, and having never levied any fine or suffered any recovery thereof, had no power to make any such leases; and



and that he, the appellant, having, by his fine and settlement in 1697, conveyed the estates which he became entitled to upon the death of Lord *Charles*, to the use of himself for life, with remainder to his first son in tail, by which the inheritance was then vested in the other appellant the Lord *Dunkerron*; he was not bound by the before mentioned covenants, nor was able to execute any such renewals to the respondent.

The respondent thereupon, in *July*, 1736, exhibited his bill in the Court of Exchequer in *Ireland*, against the appellants; stating the said several leases, and his title to them, and the several tenders made on the dropping of the respective lives above mentioned; and praying, that the appellant Earl *Henry* might be compelled to execute renewals of the said leases, according to the covenants therein contained, on payment of the said respective fines; or, that the respondent might have a compensation out of the real and personal assets of the said *Charles Lord Shelburne*, deceased.

The appellant the Earl, in *July*, 1737, put in his answer to this bill, and thereby stated the settlement in 1679; and admitted, that his brother Lord *Charles* died seised of several estates in fee; one of which was of the yearly value of 866*l.* 13*s.* 4*d.* and another of 148*l.* *per ann.* which estates had descended to him as brother and heir of Lord *Charles*; and he further stated, that soon after the death of Lord *Charles*, by indentures of lease and release, dated the 15th and 16th of *April*, 1697, being a settlement made upon his intermarriage with the Countess his wife, in consideration of the said marriage, and of her marriage portion, all the said lands, subject to the estate for life of the Lady Dowager *Shelburne*, were limited to the uses before stated; whereby he was made tenant for life, with a remainder in tail, which was then vested in the other appellant Lord *Dunkerron*. — The Earl then admitted, that there were such covenants and clauses in the settlement, in relation to the leases in being of the estates, as before mentioned; that he had refused, and still did refuse, to renew the said leases; and insisted, that he was not obliged to do so, in regard he did not claim under his brother Lord *Charles*, and therefore did not take the estate, subject to any leases or incum-



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incumbrances made by him; who, he insisted, had no power to make such leases with such covenants of renewal as aforesaid; and admitted, that he had levied a fine of the premises in *Easter* term, 1697, but that he had suffered no recovery.

Exceptions having been taken to this answer, the Earl, on the 4th of *February*, 1739, put in a further answer; and thereby admitted, that he had, ever since the death of Lord *Charles*, accepted the rents payable by the said leases; being advised that the leases were, during the continuance of any of the lives for which they were originally granted, good and valid against him.

The cause being at issue, witnesses examined, and publication duly passed, it came on to be heard on the 17th and 20th of *November*, 1746; when the Court declared their opinion, that the respondent was entitled to renewals of the three leases in the pleadings mentioned, according to the covenants in the said respective leases, upon payment of the rent and arrears and fines, with interest; and therefore decreed, that it should be referred to the Chief Remembrancer, to state an account of what was due to the appellant Earl *Henry*, for the rent and arrears on the said respective leases, and also for the respective fines, with interest from certain times in the decree mentioned, after the death of the several lives on which renewals were claimed; and that upon payment of such rents, arrears and fines, with interest, leases should be respectively granted by the appellants, for the lives in the bill mentioned, according to the covenant of renewal for ever; on which account, all parties were to have all just allowances; and if any matter appeared difficult, the Remembrancer was to report the same specially: And it was decreed, that the Lord *Dunkerron* should have his costs from the respondent, who was to recover the same, together with his own costs, from the appellant the Earl.

D. Ryder.  
R. Wilbraham.

From this decree the present appeal was brought; and on behalf of the appellants it was argued, that tenant in tail at law, independent of the statute of 32 *Hen. VIII.* had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man; and that even by that statute, a tenant in tail has no power to grant leases to bind those in remainder; and therefore the leases in question were absolutely void as  
against



against the appellant Earl *Henry*, who did not claim under Lord *Charles*, or as issue in tail, but as remainder-man.

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It might be objected, that Lord *Charles*, who granted the leases, was tenant in tail, with remainder to the Earl in tail, and a reversion to Lord *Charles* in fee; that therefore not only the estate tail was bound, but the reversion also; and as the Earl had by fine destroyed the estate tail, in order to acquire an absolute power over the estate, the prior grants of Lord *Charles* should take place of any subsequent uses by Earl *Henry*, and would therefore bind the estate in his hands. — But to this it was answered, that the estate tail out of which the leases first arose being spent, and the Earl not claiming under it, but by a distinct limitation to himself in tail male, his fine could not let in Lord *Charles*'s leases upon that estate, which came in lieu of the Earl's estate tail; nor could it, by consolidating the two estates, let them in upon the reversion; both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement; by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first son, the other appellant; and these estates arose and were granted out of the estate tail which the Earl had before the fine, and not out of the reversion. But even if the fine did let in the leases, the most that could be insisted on was, that it let them in during the continuance of those leases only, and could not extend to leases not then in being: For there could be no ground of Equity to carry it farther, and make the fine give them a greater benefit than the law gives them; which is the mere legal effect of an act done for another purpose, and by accident only turns to their benefit, without any precedent right to it, or any consideration for it; and therefore, with respect to the respondent, totally voluntary.

It might also be objected, that in the settlement made by Earl *Henry* there was an exception of the leases; and consequently this must establish them, and every covenant in them. — To this it was answered, that Earl *Henry* at that time, which was very soon after the death of his brother, had no notice of these leases; but there being many upon the estate, it was a prudent caution in the covenant against incumbrances,



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to except the leases; by which however nothing more was intended, than to secure the covenantor against any breach of covenant, or any loss or damage that might ensue therefrom. But there could be no ground for insisting, that the exception in the covenant should establish or confirm the leases, any otherwise than so far as they were good and available in law; and much less that the respondent, or those under whom he claimed, who were no parties to the settlement, nor gave any consideration for this benefit, had a right to come into a Court of Equity, to have the benefit of this exception, or any supposed agreement implied in it, in their favour.

As to the alternative relief prayed by the bill, of either a specific performance, or a satisfaction out of the personal or real assets of Lord *Charles*; it was said, that if the respondent was entitled to any satisfaction, it must be by way of damages for non-performance of the covenants; which is a matter triable merely at law, because a Court of Equity cannot assess damages. And as Earl *Henry* had conveyed all the freehold premises by lease and release in 1697, which was before the act of 3 & 4 of *William* and *Mary*, for preventing fraudulent alienations; and before any suit was commenced for non-performance of the covenants for renewal; it was apprehended, that the appellants were not now liable to any suit or action, on account of the real assets which descended to them from Lord *Charles*. The whole estate which descended to Earl *Henry* was settled upon the appellant Lord *Dunkerron*, who was a purchaser for a valuable consideration, and consequently he could not be charged. Besides, it did not appear that any consideration was paid to Lord *Charles* upon granting these leases; the sums said to be laid out upon the premises were small, and not more than might have been laid out by a tenant for three lives; and therefore, the respondent had no merit or pretence to be relieved in equity on that account.

W. Murray.

T. Clarke.

On the other side it was contended, that by the fine which Earl *Henry* levied in 1697, the estate tail limited in remainder to him by the settlement of 1679, was barred and extinguished, in the same manner to all intents and purposes, as if he was dead without issue; and the reversion in fee, which descended to him as heir of Lord *Charles*, immediately took effect in possession;



possession; and as the new uses in the marriage settlement of 1697, arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal; and as such covenants are considered as real agreements, and go with the land, so they are in their nature proper for a specific performance; and will in Equity affect the legal interest of all those who take the estate with notice of them. That all those claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl *Henry* himself; especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. That the appellant, the Earl, was absolutely bound by the warranty and assents of his brother Lord *Charles*, even before the fine levied, and could not have entered and avoided the leases during the legal extent of them, by reason of such warranty and assents: But if the Earl, notwithstanding the warranty, and before levying the fine, could have entered on the lands and avoided the leases; the lessees would have been clearly entitled under the covenants, to have received a satisfaction for their damages out of the real assents of Lord *Charles* descended to him, which were then in his possession, and abundantly more than sufficient to have satisfied such damages. The right therefore, which the lessees had gained by the fine letting in the reversion, and giving them a specific remedy upon it, was such an advantage as a Court of Equity ought to enforce by its decree; as much as if Lord *Charles* had died seised of an immediate estate in fee simple of the leasehold premises in question. That the defence made by the Earl against the respondent's receiving a satisfaction out of the real assents of Lord *Charles*, was most inequitable; as it tended to deprive the respondent, who was a fair purchaser, of the benefit of his lease and covenants, by an act of the Earl himself; who, besides the profits received from his brother's estates, had also received, in the portion of his wife, a consideration for the alienation of his brother's assents by the settlement. And with respect to Lord *Dunkerron*, no incumbrance was brought by this decree upon the estate which he derived under his father's settlement, but



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but what appeared, from the express exception in that settlement, to be intended as a charge upon it. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE  
affirmed.  
Jour. vol. 27.  
p. 226, 231.

AFTER hearing counsel on this appeal, the following question was put to the Judges; viz. "Whether by the fine levied by the appellant the Earl of *Shelburne*, in *Easter* term, 1697, the reversion in fee of the estate in question was let in, subject to the leases in question made by *Charles* Lord *Shelburne*, and the covenants therein contained for a perpetual renewal?" And the Lord Chief Justice of the King's Bench, having delivered the unanimous opinion of the Judges to this effect, viz. "That the leases for lives now in being were good and effectual, as being served out of the reversion in fee which Lord *Charles* had when he made them, and which was now in Lord *Henry*; and that the covenants for renewal, were binding on Lord *Henry*, as a lien on the same reversion, which he had let in by barring, discharging and extinguishing his estate tail:" It was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of affirmed; and that the appellant, the Earl of *Shelburne*, should pay to the respondent 100*l.* for his costs, in respect of the said appeal.

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Case 69. *Henry Parminter*, - Plaintiff  
*Thomas Symons*, - Defendant } in Error.

22d February, 1748.

Strange 1269.

**T**HOMAS *Symons*, the plaintiff in the original cause and defendant in error, for many years before and in the year 1739, transacted business with the plaintiff *Parminter* and his partner one *Lawrence Barrow*, who were merchants, and then resided at *Bilboa* in *Spain*: And during the course of their dealings, several foreign bills of exchange had been at different times negotiated between them: Upon which and other accounts,



accounts, they became indebted to the defendant in a considerable sum of money.

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In June and September, 1739, the defendant, in order to receive satisfaction for part of his debt, drew two foreign bills of exchange, according to the custom of merchants, upon *Parminter* and *Barrow*, at *Bilboa*; the first for 4000 dollars, payable at usance, to the order of *John Evangelist Cleer* and C<sup>o</sup>. at *Madrid*; and the other for 1500 dollars, payable at usance, to the order of Mr. *Manuel de la Quintana*. Which bills were afterwards, and before they became payable, presented to and duly accepted, according to the custom of merchants, by *Parminter* and *Barrow*, at *Bilboa*.

But they afterwards refusing payment of these bills, they were duly protested in the usual form by *Cleer* and *Quintana* respectively, for non-payment. And the bills and protests were sent back by *Cleer* and *Quintana* to *England*, and the money demanded of the defendant as the drawer; which money he being obliged to pay, he accordingly did pay to *Cleer* and *Quintana* respectively, who had not indorsed the bills, or either of them; together with the interest, exchange, re-exchange, costs and damages, on both the bills, which amounted to between forty and fifty pounds.

In *Easter* term, 1743, the defendant, for the recovery of 1300*l.* due to him, for what he had so paid to *Cleer* and *Quintana* on the said bills of exchange, as also for what was due to him on the balance of his general account with *Parminter* and *Barrow*; sued out a special original writ, in a plea of trespass on the case, against them, returnable in the Court of King's Bench on the Morrow of the *Holy Trinity* then next following.

Upon the return of the original writ, he sued out a *capias ad respondendum*, against both *Parminter* and *Barrow*, returnable the last return of the same *Trinity* term. *Parminter*, being then in *England*, was arrested, and put in bail: But as this was a joint action against *Parminter* and *Barrow* as partners in trade, the defendant could not declare against *Parminter* alone. And *Barrow* being then in *Spain*, he was obliged to award an *alias* and *pluries capias*, against *Barrow*; and, for want of his appear-



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ance, proceeded to outlawry against him, and he was accordingly outlawed; the *exigent* being returnable the last return of *Hilary* term, 1744. And in the same term, judgment of outlawry was entered up against him.

The defendant in error therefore, in the same *Hilary* term, filed his declaration against *Parminter*; and thereby, after stating the outlawry against *Barrow*, declared, that the said *Henry Parminter* and *Lawrence Barrow* were indebted to him in 1300*l.* for work and labour done; and in 2000*l.* for money laid out expended and paid; and in 1600*l.* for money lent; and in 2000*l.* for money had and received by *Parminter* and *Barrow*, for the use of the said *Symons*. — The declaration then proceeded as follows; *viz.* “ And whereas the said *Thomas Symons*, “ on the 28th day of *June*, in the year of our Lord 1739, at “ *London* afore said, in the parish and ward afore said, according “ to the usage and custom of merchants, made his bill of “ exchange in writing, his own hand being thereunto sub- “ scribed, bearing date the same day and year; and directed “ the said bill to the said *Henry* and *Lawrence*, then being, “ residing and using commerce at *Bilboa*, in foreign parts, “ *to wit*, in *Spain*; and thereby requested the said *Henry* and “ *Lawrence*, at usance, to pay that his first bill of exchange at “ *Madrid*, in *Spain* afore said, to the order of *John Evangelist* “ *Cleer* and company, dollars, four thousand in gold or silver, “ as to the exchange known to them that day, value in account “ with the said gentlemen, as by advice: Which said bill of “ exchange afterwards, *to wit*, on the 10th day of *August* in the “ year afore said, at *Bilboa* afore said, the said *Henry* and *Law-* “ *rence*, who, &c. accepted according to the usage and custom “ of merchants: And the said *Thomas Symons* in fact says, that “ an usance between *London* afore said and *Madrid* in foreign “ parts, *to wit*, in *Spain* afore said, is, and from time whereof “ the memory of man is not to the contrary, hath been two “ months; and that the said *Henry* and *Lawrence*, who, &c. “ did not, nor did either of them pay to the said *John Evan-* “ *gelist Cleer* and company, the said money contained in the “ said bill of exchange, nor any part thereof; but refused and “ neglected to pay the same. Whereupon afterwards, *to wit*, “ on the 21st day of *September* in the same year (the said *John* “ *Evangelist Cleer* and company having made no order concern- “ ing



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“ ing the payment thereof) the said bill of exchange, at the  
 “ request of the said *John Evangelist Cleer* and company, was  
 “ protested at *Madrid* afore said, according to the usage and  
 “ custom of merchants upon the non-payment of the said  
 “ contents thereof; by reason whereof, he the said *Thomas*  
 “ *Symons*, according to the usage and custom of merchants, be-  
 “ came liable to pay to the said *John Evangelist Cleer* and com-  
 “ pany, the said contents of the said bill of exchange, toge-  
 “ ther with the interest, exchange and re-exchange, costs and  
 “ damages, which should accrue from the delay and retardment  
 “ of the payment thereof; and being so liable, he the said  
 “ *Thomas Symons* afterwards, *to wit*, on the first day of  
 “ *January*, in the year afore said, at *London* afore said, in the  
 “ parish and ward afore said, paid to the said *John Evangelist*  
 “ *Cleer* and company, the said contents of the said bill of  
 “ exchange; and the sum of 36*l.* 15*s.* of lawful money of  
 “ *Great Britain*, for the interest, exchange and re-exchange,  
 “ costs and damages, which did accrue from the delay and  
 “ retardment of the payment thereof; of which said premisses,  
 “ the said *Henry* and *Lawrence*, who, &c. afterwards, *to wit*,  
 “ on the 15th day of *January* in the same year, at *London*  
 “ afore said, in the parish and ward afore said, had notice; and  
 “ by reason of the premisses, and by force of the usage and  
 “ custom of merchants, they the said *Henry* and *Lawrence*,  
 “ who, &c. became liable to pay to the said *Thomas Symons*, the  
 “ said contents of the said bill of exchange, and the said sum  
 “ of 36*l.* 15*s.* so paid by the said *Thomas Symons* to the said  
 “ *John Evangelist Cleer* and company as afore said; and being  
 “ so liable, they the said *Henry* and *Lawrence*, who, &c. in  
 “ consideration thereof, afterwards, *to wit*, on the same day and  
 “ year at *London* afore said, in the parish and ward afore said,  
 “ took upon themselves, and then and there faithfully pro-  
 “ mised the said *Thomas Symons*, that they the said *Henry* and  
 “ *Lawrence*, who, &c. would pay to the said *Thomas Symons*,  
 “ the said contents of the said bill of exchange, and the said  
 “ sum of 36*l.* 15*s.* so paid by the said *Thomas Symons* to the  
 “ said *John Evangelist Cleer* and company as afore said, when  
 “ they should be thereunto afterwards requested.” — The next  
 count was upon the bill of exchange, made payable to Mr. *Ma-  
 nuel de la Quintana*, dollars, one thousand five hundred. And  
 the plaintiff *Symons* laid his damage at 1300*l.*

To



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To this declaration, *Parminter* pleaded, by leave of the Court, two pleas in bar: 1st, That there was not any record of the outlawry of the said *Lawrence Barrow* upon the said writ in the plea aforesaid, as alledged in the said declaration. 2dly, That *Lawrence Barrow*, in the said declaration named, before and at the time of obtaining of the original writ, on which the outlawry, by the said declaration, was supposed to be obtained and had against the said *Lawrence Barrow*; and also before and at the time of the awarding the writ of *exigent*, and continually from that time hitherto, did dwell and was commorant, and was then dwelling and commorant in parts beyond the seas, and out of the limits of this realm, *to wit*, at *Bilboa*, in the kingdom of *Spain*, in the said declaration mentioned; and that the county of *Cornwall*, in this kingdom, was and is the shire next to the place where the said *Lawrence Barrow*, at the time of the said writ of *exigent* awarded, had his dwelling; and that not any writ of proclamation thereon was awarded, made, or directed to the sheriff of the said county of *Cornwall*.

In *Trinity* term, 1745, the defendant in error (after having, by leave of the Court, set forth the original writ *in hæc verba*) replied issuably to *Parminter's* first plea; and demurred to his second plea. Whereupon *Parminter* immediately joined in demurrer, and likewise demurred to the plaintiff's replication to his first plea; and shewed, for causes of demurrer, that it appeared by the said replication, that the writ upon which it was supposed the said *Lawrence* was outlawed, was not the same writ upon which the said *Thomas Symons* had, in form aforesaid, declared against the said *Henry*, but another, and variant from the original writ, recited in the said declaration of the said *Thomas Symons*; and for this, that the said replication was double, uncertain, and wanted form; and upon this the plaintiff joined in demurrer.

The cause was from thence continued till *Hilary* term, 1746, when the demurrers came on to be argued before the Court of King's Bench; and were afterwards argued a second time in *Trinity* term, 1747, when the Court gave judgment for the plaintiff *Symons* on both demurrers.

In



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In *Michaelmas* term following, a writ of inquiry of damages was executed, by rule of Court, before the Lord Chief Justice *Lee*; when the inquest found damages generally for the plaintiff, 1300*l.* the whole damages laid in his declaration.

*Parminter*, in that same term, moved in arrest of the plaintiff's judgment; and made three objections: I. That there was no such custom of merchants, as was set out upon the plaintiff's declaration; and that the acceptor of a bill of exchange (afterwards protested for non-payment, and paid to the payee by the drawer, with the interest, exchange, re-exchange, costs and damages) was not by law liable to the drawer, without a previous assignment or indorsement of such bill to him by the payee. II. That the demurrer to the plaintiff's replication, after issue joined, was a discontinuance of the suit. — But it was the defendant's own demurrer; for the defendant having pleaded, that there was no such record of *Barrow's* outlawry, as the plaintiff had alledged; the plaintiff replied there was such a record, and thereupon issue was joined. III. That the declaration had not set forth the value of the 4000 dollars, mentioned in the sixth count; nor the value of the 1500 dollars mentioned in the seventh count.

The Court, after solemn argument, and time taken to consider, in *Hilary* term, 1747, was unanimously of opinion, as to the first objection, that the plaintiff's action was well brought; that, by the custom of merchants, the defendants were bound by their acceptance; and that an indorsement by the payee was not necessary; and the rather, for that, in the present case, the plaintiff had made title another way; viz. by payment of the money; and therefore gave judgment for the plaintiff in the action. — As to the other two objections, the Court was of opinion, they were of no weight.

To reverse this judgment, the defendant *Parminter* brought a writ of error in Parliament, assigning the general errors; but no case was made to support it, nor did any counsel appear for him upon the day appointed for argument.

However, on behalf of the defendant in error it was said, H. Bankes.  
that the only considerable question in point of law (for as to R. Draper.



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the justice and equity of the case there could be none) was, Whether the drawer of a bill of exchange, accepted generally by the drawee, protested by the payee for non-payment, and afterwards paid by the drawer, could, in his own name, and without a previous assignment or indorsement from the payee, maintain a special action on the case against the acceptor, and recover the money so paid. And it was insisted, that by the rules of law, and the custom of merchants, the defendant in error could maintain such action; and that the proceedings therein were right, and agreeable to the principles of law and justice. For, the plaintiff in error had not controverted the fact of the custom, as set forth in the declaration; but had admitted, that if the defendant had taken an assignment or indorsement of the two bills of exchange from the two payees thereof, he might have maintained an action in his own name. The acceptance of a bill of exchange, amounts to a promise in law to pay; and this action of *assumpsit* against the acceptor, is founded upon good consideration; namely, of his having effects of the drawer's in his hands, at the time of his acceptance. But a general acceptance, as in the present case, is an admission by the acceptor, that he is debtor to the drawer for so much money; and that he has effects or money of the drawer's in his hands, to answer the payment of such bill. Besides, every bill of exchange imports a command to the drawee to pay; and his acceptance is not only an admission of effects or money in his hands sufficient to pay; but it is an undertaking by the acceptor, as well with respect to the drawer as the payee, to pay the bill; and every undertaker is bound by law to perform his engagement. It was therefore hoped, that the judgment would be affirmed, with exemplary costs.

JUDGMENT  
affirmed,  
Jour. vol. 27.  
p. 286.

ACCORDINGLY, after hearing counsel for the defendant in error, the plaintiff making default, and no counsel appearing for him; it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed, and that the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House: And it was further ORDERED, that the plaintiff should pay to the defendant 100*l.* for his costs, sustained by reason of bringing the said writ of error.



*William Plunket*, Appellant.

Case 70.

*Henry Lord Viscount Kingstand, Francis Lord Athunry, and Thomas Wakely*, Respondents.  
Esq;

11th January, 1749.

**I**N consequence of the affirmance of the decree in this cause, the issues thereby directed, were tried in the Court of King's Bench in *Ireland*, on the 26th of *June*, 1747; when the jury found a verdict in the following words: "We find it was no part of the agreement between the Right Honourable *Henry Lord Viscount Kingstand* and the plaintiff, for a lease of the warren and mill of *Portmarnock*, in the pleadings in this cause mentioned; that the consent or approbation of *Peter Daly*, Esq; in the pleadings also mentioned, should be had to make such lease valid: And we find, that the said *Peter Daly* gave no such consent or approbation: And we find, the Right Honourable *Francis Lord Baron of Athunry*, and the defendant *Wakely*, had, on or before the 1st of *January*, 1741, sufficient notice of the agreement between the plaintiff and the said *Lord Kingstand*, for a lease of the said warren and mill of *Portmarnock*."

Vide ante,  
P. 567.

This verdict being certified by the Court of King's Bench to the Court of Chancery, the respondents, on the 8th of *July*, 1747, moved that Court for a new trial; upon an affidavit, that the answer of *Lord Kingstand* was permitted to be read upon the former trial: But the Lord Chancellor having discoursed with the Judges before whom the trial was had, and being by them informed, that they were satisfied with the verdict, and that the jury were expressly told by the Court, that *Lord Kingstand's* answer was not evidence against the respondent *Wakely*; his Lordship, on the 8th of *February*, 1747, refused to grant a new trial upon that foundation.

The



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The appellant, apprehending the verdict to be now confirmed, brought on his cause to hearing upon the equity reserved, and on the 10th of *May*, 1748, the same was heard accordingly; when it being objected by the counsel for the respondents, that the verdict upon the second issue was so totally uncertain and insufficient, as to make it impossible for the Court to found any decree upon it in favour of the appellant; the Lord Chancellor was pleased to order, that the parties should proceed to another trial at law, upon the said second issue.

Accordingly, on the 15th of *June* following, this issue was again tried; when the jury returned the following verdict: “ We find, that the Right Honourable *Francis*, Lord Baron of “ *Athunry*, had notice, before the 1st day of *January*, 1741, “ of an agreement made between the plaintiff and Lord *King-* “ *land*, for a lease of the warren and mill of *Portmarnock*, in “ the issue mentioned, for the term of 31 years, at the yearly “ rent of 45*l.* to commence from the 1st day of *November*, 1741, “ and a fine of 61 *l.* which was paid; which notice appeared “ to us, by letters written and signed by the said Lord *Athunry*, “ and the testimony of Mr. *Cornelius Kelly*: And that *Thomas* “ *Wakely*, the defendant, had also notice of the said agreement, “ before the 1st of *January*, 1741; which notice was given him “ by Mr. *Goddart*, then agent and receiver to Lord *Kingland*.

In a few days after this verdict, application was made to the Court of Chancery by the respondent *Wakely*, to set it aside and grant a new trial; because the jury had not found the nature of the agreement between the appellant and Lord *Kingland*, whether it was by parol or in writing, nor what the notice was, which Lord *Athunry* and Mr. *Wakely* had of such agreement; also because the commencement, term and rent of the lease agreed for, was proved by parol evidence only, which was contrary to the statute of frauds and perjuries, and ought not to have been received by the Court; and because the jury had mentioned the particular evidence on which their verdict was founded, and which they ought not to have done.

To support this motion, two affidavits were laid before the Court, made by Mr. *Wakely* and one *Nicholas Mullegan*, his agent; stating, that *Mullegan* had attended, and taken notes at the



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the last trial; and that the appellant's counsel having offered to prove the agreement between the appellant and Lord *Kingsland* by parol evidence, the counsel for the respondents objected thereto, as contrary to the statute of frauds and perjuries, but that the objection was over-ruled. — That *Kelly*, whose testimony was mentioned in the verdict, gave no evidence of the commencement of the appellant's term. — That the only written evidence read for the appellant on the trial, were two letters of Lord *Athunry*, and one from Lord *Kingsland*; but in which neither the land, rent, term, or commencement were mentioned. — That *Goddart*, the other witness mentioned in the verdict, being examined for the appellant, declared he could not say, that he told Mr. *Wakely* the terms of Lord *Kingsland*'s agreement with the appellant, or when the appellant's term was to commence. — That the counsel for the respondents insisted on the trial, that if the jury should find an agreement between the appellant and Lord *Kingsland*, they ought to find the nature of such agreement, whether by parol, or in writing; and if they should find, that the respondents had notice of such agreement, they ought to find what such notice was, and the nature of it. — That the verdict being read, and no mention made when the appellant's term was to commence, it was observed to the jury, that the verdict did not fully answer the issue directed; whereupon one of the jurors informed the Court, that it did not appear to them by any evidence, when the appellant's term was to commence; upon which, one of the appellant's counsel said, they had Mr. *Goddart* in Court to prove that matter. — And that Mr. *Goddart* being thereupon examined, said, that he told Mr. *Wakely*, in one of the three first holidays in *Christmas* 1741, that the appellant's term was to commence the 1st of *November*, 1741; after which the following words were interlined in that part of the verdict relating to notice on Lord *Athunry*, viz. “to commence from the 1st of “*November*, 1741.”

No affidavits were made by or on the part of the appellant; but his counsel informed the Court, that in order to save the expence of any more trials, they were ready to consent, that the cause should be heard upon the agreement, as if it had been found to be a parol agreement; because, under the circumstances



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of the case, they apprehended it did not come within the statute of frauds. The respondents counsel, however, insisting upon their motion for a new trial, the Lord Chancellor ordered it to stand over, till he had talked with the Judges who sat on the last trial. This conversation was accordingly had, when the Judges gave their opinion, that the verdict was agreeable to the evidence; notwithstanding which, and tho' the appellant's counsel, upon the question being put to them, admitted that there was no other evidence of the commencement, term, or rent, but parol evidence only; yet his Lordship, on the 3d of *December*, 1748, was pleased to set aside the last verdict, and grant the respondents a new trial.

D. Ryder.

W. Murray.

The appellant, therefore, appealed from this order; insisting, that the former decree, and the affirmance of it, had already determined what were the issues proper to be tried, previous to the appellant's relief; viz. 1st, Whether the agreement was absolute or conditional, depending upon Mr. *Daly's* subsequent consent; which had been found in favour of the appellant, was confirmed by the Court below, acquiesced in by the respondents, and was now at peace. — And by the second issue, the notice of that agreement, and not the agreement itself, was the subject of the inquiry; in which the jury were likewise to find the nature of the agreement, of which the respondents had notice, whether absolute or conditional, according to the first issue: And this second issue had been likewise determined in the affirmative, by two concurrent verdicts. That neither of the issues ever meant to inquire, if there was any, and what agreement, between the appellant and Lord *Kingstand*; because such issues would have been unnecessary and improper, without the previous admission of the existence of an agreement; neither was there any question between the parties what the agreement was, or whether in writing; but whether the consent of Mr. *Daly* was necessary, and whether the respondents had notice. And as the Court could not regularly go into any proof of the reality of the agreement, as being out of the issue, it was immaterial what kind of proof was given of it; for the nature of the agreement was well known, and that it was by parol; and therefore an inquiry was only necessary and directed, as to collateral circumstances attending it. That after the order affirming



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affirming the decree, the Court below had no power to vary the issues at first directed; and as the two concurrent verdicts fully answered the issues so directed, they ought to have satisfied the conscience of the Court; and especially, as those verdicts were to the entire satisfaction of the Judges who tried the issues.

It was however objected, that the evidence laid before the jury was of a parol agreement, yet the verdicts, as they stood, insinuated a written agreement. — That parol evidence of the agreement ought not to have been laid before the jury, as being contrary to the statute of frauds and perjuries. — That Lord *Athunry's* letters, which were the only written evidence laid before the jury, specified neither rent, term, or commencement: And that therefore the jury had not sufficient evidence to support the verdict.

But it may be answered, that a verdict found by twelve men, upon their oaths, and certified by the Judges to be entirely to their satisfaction, is never suffered to be impeached as contrary to evidence, by affidavits. That the finding the particular evidence, was surplusage, and would not vitiate the verdict; nor could the impropriety of finding what they were not desired to find, be a reason for defeating the only matter referred to them; and which they had found. That the appellant never pretended to more than a parol lease, reduced into writing by Lord *Kingsland's* receipt of the 5th of *December*, 1741, which ascertained all the terms of the agreement, as to rent, commencement and term; and this receipt, or written agreement, being confirmed by the appellant's payment of his fine, and possession, his improvements, and payment of his rent, fully removed the objection arising from the statute; and the reference to the letters went only to the point of notice, and not as to the commencement, rent, or term. That if a parol agreement was within the words of the issue, as it undoubtedly was, parol proof might certainly be given of it; and the appellant's counsel admitted there was no other testimony of the term, commencement, or rent, but what was parol. That whether the appellant was entitled in a Court of Equity, to a specific performance of such an agreement as he claimed under, attended with such circumstances of possession, improvement and expence, in opposition to a subsequent lessee with notice, was a  
mere



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mere question of law and equity ; the only facts upon which any doubt arose, were whether the agreement was absolute, or whether Lord *Atbunry*, or Mr. *Wakely* had notice : By directing these and no other facts to be tried, the House, upon the former appeal, had in effect declared, that if they came out in favour of the appellant, he would be entitled to relief ; the direction of such issues, proceeded upon the agreement as a certain established fact ; and so did the verdicts, by which it was found that a particular condition was not annexed to the agreement, and that the respondents had notice of it. That if two concurrent verdicts upon trials at bar, by special juries, and to the entire satisfaction of all the Judges, were not sufficient to establish so simple a fact as notice of an agreement, there could be no end ; but if the Court was satisfied with the fact of notice, and intended by this third trial, to be informed whether the agreement was by parol, or in writing, it ought to have been so expressed and declared, that the jury might see upon what point the Court wanted further satisfaction ; but surely, if this was the desired information, it was directing an issue to try a matter not disputed. That these repeated trials were the more grievous in the present case, because the question only concerned a lease for a term of years, a great part of which was expired ; and the expence of the litigation, had already been almost equivalent to the value of the inheritance.

W. Noel.

On the part of the respondent Lord *Kingland*, who appeared on this appeal, it was argued, that his agreement with the appellant did not rest in parol and executory only, but was immediately executed by the appellant's possession, payment of his fine, and improvements ; and that the defeating an agreement attended with these circumstances, because it was not reduced into writing, would, instead of preventing frauds and perjuries, render the statute made for that purpose, a snare in the hands of designing men, to defraud the more incautious to their ruin. That the controversy between the parties had not arisen upon the reality, terms, commencement, or duration of the agreement, all which were fully stated by the bill, and admitted by the answers ; but whether the agreement was conditional, or absolute, and the first verdict had fully established it as an absolute agreement, to the satisfaction of the parties, as well as the Court. That actual and not circumstantial notice only



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only of this agreement, had been found upon the respondents Lord *Atbunry* and Mr. *Wakely*, by two concurrent verdicts of different juries, on the testimony of living witnesses, cross-examined by the respondents, and unimpeached by other evidence; which must in a Court of Equity, render them trustees for the appellant, as having the prior equity. But if it was intended by a new trial, to let in the question arising upon the statute of frauds, whether a parol agreement would, under the circumstances of this case, be executed in a Court of Equity; the benefit of that question was fully saved by the appellant's admission, and an agreement confessedly parol, could not admit of any other than parol proof; so that if the cause was to be tried *ad infinitum*, no other evidence could be given of the agreement; and therefore the directing a new trial, was in effect to direct the finding a verdict against the appellant; at least, the cause must return to the jury very much prejudiced by so many repeated trials. That the verdicts of twelve men upon their oaths, were not rashly to be brought in review by loose uncertain affidavits of two persons only, the one a party concerned in interest, the other his agent; whose memory and notes were not to preponderate the balance against a solemn verdict, ratified by the sanction of the Judges under whose direction it was given. That the decree and the order of affirmance had established the proper issues between the parties; and those issues had been satisfied by repeated verdicts: It was not therefore in the power of the Court below, to vary or depart from the issues originally directed, but the consideration of the appellant's relief upon the facts found by the verdict, was fully and properly before the Court, and ought to have been determined.

On behalf of the other respondents it was said, that two things were necessary for the appellant to make out in proof, upon the trial of the second issue; viz. 1st, That a proper agreement was entered into between him and Lord *Kingsland*, and what were the terms of such agreement: And 2dly, That Lord *Atbunry*, or the respondent *Wakely*, had notice of such agreement, and what that notice was. But in both these particulars, it was apprehended the appellant had failed: For the verdict on this issue, as to the agreement therein mentioned, was founded only on parol evidence of a verbal agreement; the letters of Lord *Atbunry* not proving any agreement, and much less specifying

J. Browne.  
T. Clarke.



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the terms, or any of the other essential parts of an agreement. That such parol evidence of a verbal agreement ought not to have been admitted, as being in itself improper and of mischievous consequence; and not only contrary to the statute of frauds and perjuries, but contrary to what seemed to be the intention of the Court in directing the issue. That tho' it was alledged on the part of the appellant, that if the agreement was originally a verbal one, the same was in a great measure carried into execution by subsequent acts and transactions; such as the appellant's paying the fine, and half a year's reserved rent, and his having possession of the estate, and making improvements thereon; yet those acts and transactions appeared, and were proved in the cause to have been extremely fraudulent on his part, and were of themselves sufficient to destroy that equity, which he attempted to set up in support of his claim. But supposing the evidence laid before the jury on the part of the appellant, had been proper and unexceptionable, it by no means warranted the verdict certified; for the verdict certified, substantially varied from the verdict originally brought in by the jury, by the addition of a material fact; and this variation was made irregularly, and without proper evidence. It was therefore hoped, that as the order appealed from was made upon deliberate consideration of the nature and circumstances of the case, and was perfectly agreeable to the rules of equity and justice, the same would be affirmed, and the appeal dismissed with costs.

ORDER  
reversed.  
Jour. vol. 27.  
p. 389.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be reversed: And it was further ORDERED, that the Court of Chancery in *Ireland* should proceed to the hearing of the cause on the equity reserved, according to the course of that Court; and that on such hearing, the appellant should be bound by the admission of his counsel, mentioned in the said order, "that  
" there was no other evidence given at the trial of the cause in  
" the Court of King's Bench, than what was parol, of the  
" commencement or duration of the term claimed by the  
" appellant in the premises in question."

The END of the FOURTH VOLUME.



the terms, or any of the other essential parts of an agreement. That such verbal evidence ought not to have been admitted, as being in itself improper and of mis-

# TABLE

OF THE PRINCIPAL MATTERS

## PRINCIPAL MATTERS

Contained in this VOLUME.

### Agreements.

**A.** Upon application to the Court of Aldermen, for licence to marry an orphan of the City of London, personally agreed in open court, to take up his freedom of the city, within one year next ensuing. In consequence of this agreement, the licence was granted and the marriage had. But **A.** though he lived 40 years afterwards, never became a freeman; and disposed of his estate by will, without any regard to the custom of London. Held, that the will was void as to two thirds of the personal estate; and that the same ought to go and be distributed, as if the testator had actually taken up his freedom in his life-time. *Page 7*

**I. S.** in consideration of marriage, covenants to settle lands of 350*l.* *per annum*, upon himself and wife, and the issue male of the marriage, with remainder to his brother in tail. Equity will compel a specific performance of

this covenant in favour of the brother, altho' he was no party to the articles; without putting him to an action of covenant in the trustee's name. *P. 26*

**A.** on his marriage entered into articles, whereby he covenanted to settle his whole estate upon himself for life, with remainder to his first and other sons in tail. No settlement was made pursuant to these articles; but **A.** when his eldest son attained 21, prevailed on him by threats, promises, &c. and under a total ignorance of the articles, to join in a settlement, whereby the estate was limited to different uses; and a power given to the father of making a jointure. This settlement was set aside as against the eldest son for fraud, and the articles were established. And the father having, on his marriage with a second wife, given a bond conditioned for making her a jointure; this bond was also set aside as against the heir, and the wife was put to seek satisfaction for the penalty of the bond,

out



## A TABLE of the Principal Matters.

cut of her husband's personal affets.

Page 199

A man makes his son by the first wife, agree to a provision for a second wife, and the issue of that marriage. This provision being in the son's own wrong, and he being at this time ignorant of his right; the agreement is a fraud upon him, and he shall not be held to a performance of it. 237

Where a lessor covenants for the perpetual renewal of a lease, upon the lessee's naming a new life, and paying a fine within a certain time after the death of any of the *cestui que vies*; a Court of Equity will, upon slight circumstances, relieve the lessee against a forfeiture, for not literally complying with the terms of the covenant. 411

If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, &c. or attempt to set the agreement aside on that account. For a Court of Equity will decree a specific performance of the remaining part of it. 421

In what case an heir is bound to perform his father's covenant, tho' he is neither his personal representative, or claims any part of his real estate, except what was settled upon him in strict settlement, and in which his father had only an estate for life. 435

In treaties for an agreement, a wilful and industrious concealment of a material fact, by one of the parties, in order to keep the other in ignorance, and to profit by that ignorance, is a gross fraud, and will in equity set aside the contract. 497

But where a lessee wilfully conceals the death of any of the *cestui que vies*, and acts under such concealment for his own advantage; the lessor is not obliged to renew, but may take advantage of

the forfeiture, and enter upon and hold the estate. Page 512

Where on an agreement for a lease, the particular rent, commencement and duration of the lease are uncertain, or depend upon the approbation of a third person; a Court of Equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed. 567

In what case a remainder-man in tail after levying a fine, is bound by the covenant of the precedent remainder-man in tail. 594

Covenants for the perpetual renewal of leases are considered as real agreements, and go with the land; and will therefore affect even the legal interest of all those who take the estate, with notice of these leases and covenants. *ibid.*

### Appeal.

No appeal to the House of Lords will lie against a decree, before it is signed by the Lord Chancellor. 194

Nor from an order of a Court of Equity to shew cause, before such order be made absolute. 368

Under what circumstances an appeal may be brought from an old decree, by a person who was neither party or privy to the suit in which the decree was made. 383

No appeal lies to the House of Lords in *Ireland*, from the judgment or decree of any Court in that kingdom. 390

The statute of 6 *Geo. I. c. 5.* did not introduce any new law, but is only declarative of what the law was before. 395

On an appeal, the House reserve giving judgment upon the point, till an account is taken between the parties.

The



## A TABLE of the Principal Matters.

The account is accordingly taken, but before the appeal is brought on again, one of the parties dies; and the suit below is thereupon regularly revived. This is sufficient, and the appeal itself need not be revived. *Page 553*

### Assets.

The words "*imprimis*, I will, that all the debts which I shall owe at the time of my decease, be discharged and paid;" are sufficient to make the real estate liable, in case of a deficiency of personal assets. *90*

### Bankrupt.

The committing a secret act of bankruptcy before the petitioning creditor's debt accrued, will not invalidate the commission sued out by him. *317*

In what case a secret act of bankruptcy shall overturn all subsequent conveyances and securities made by the bankrupt, to the prejudice of his just creditors. *327. Note.*

### Baron and Feme.

Where a husband and wife acquire a joint right or interest in a personalty, the husband alone may release, or otherwise dispose of it as he pleases. *168*

*Choses en action* are assignable by a husband for the satisfaction of his *bonâ fide* creditors, although no settlement was made by him on the marriage. *ibid.*

### Bill of Review.

By the established practice of the Court of Chancery, there are but two sorts of bills of review; one founded on supposed error appearing in the de-

creet itself, the other on new matter. And as to new matter, it must have arisen in time after the decree; or upon new proof, which could not have been used at the time when the decree passed. *Page 465*

But this new proof must be such as was not known either to the party, or his attorney, solicitor or agent; for notice to the attorney, &c. is by the clear rule of the court, considered as notice to the party. *ibid.*

### Bills of Exchange.

The drawer of a bill of exchange, accepted generally by the drawee, and protested by the payee for non-payment, and afterwards paid by the drawer; may in his own name, and without any previous assignment or indorsement from the payee, maintain a special action on the case against the acceptor, for the money so paid. *604*

Every bill of exchange imports a command to the drawee to pay, and his acceptance is not only an admission of money or effects in his hands, sufficient to pay; but is an undertaking by the acceptor, as well with respect to the drawer as the payee, to pay the bill. *ibid.*

### Clergy.

The living of a clergyman is not an office civil or military, within the statute 2<sup>o</sup> Ann. intitled, "An act against the further growth of popery." And therefore, upon the trial of an ejectment brought by a parson for part of his glebe, it was not held incumbent upon the plaintiff to prove, that his lessor had taken the oaths and received the sacrament, according to the directions of that statute. *281*



## A TABLE of the Principal Matters.

The augmentation of a vicarage, by a yearly payment of corn and money out of the rectory, is a charge upon the rectory impropriate, into whose hands soever it shall come. *Page 537*

And where a vicar brings his bill for the arrears of these annual payments, he shall recover against the impropriator; though a considerable time has elapsed between the commencement of the arrears, and the impropriator's possession. *ibid.*

But if, pending such suit, a man purchases the rectory, with notice of the Vicar's claim; he is only liable for the arrears which have accrued, since he came into possession. *ibid.*

### Colleges.

Visitors of colleges are not tied up to any particular forms, nor to be prohibited for irregularity in their proceedings, or informalities in their acts, but only for want of jurisdiction. And therefore, where a visitor cited the Master of a college to appear before him as *special* visitor, and afterwards in a plea to an action of prohibition, he insisted on being *general* visitor of the college, this variance was held not to be erroneous; but he having jurisdiction either in one character or the other, had a right to proceed upon the citation. *41*

### Conditions.

*I. S.* by will bequeathed to his daughter *Ann* in these words, *viz.* "Item. "I leave and bequeath to my said "daughter *Ann* 2000 *l.* to be paid her "on the day of her marriage, or at the "age of 21 years, which shall first hap- "pen; and in case my daughter *Ann*

"shall marry with the consent and ap- "probation of *R. S. &c.* or any two of "them, I farther leave and bequeath "to my said daughter *Ann*, the ad- "ditional sum of 2000 *l.* more, *otherwise* "not." *Ann* married *without* the con- sent required by the will; and on a bill brought by her and her husband for both these legacies, it was held, that she was only entitled to the first; and had forfeited the second, by not complying with the condition required by her father's will. *Page 103*

The proviso in a mortgage is, that if the mortgagor fails in payment of the principal money and interest at a time limited, the estate of the mortgagee shall be absolute, and indefeazable, as well in equity as at law. Default is made, and many years elapse without any application to redeem. In this case, the mortgagee is considered in the light of a *conditional* purchaser, and no redemption shall be decreed against him. *142*

*A.* gives a legacy of 1000 *l.* to *B.* payable at the day of her marriage, in case she should marry any person of the surname of *S.* but if she should not, he gave the legacy to *W.* *B.* married a person who *assumed* the surname of *S.* But it was held, that this was not a performance of the condition, so as to entitle *B.* and her husband to the legacy. *194*

### Corporations.

The charter of a corporation directs the mayor to be annually chosen, out of four of the *burgesses*, or *inhabitants*; but by a bye-law it is ordained, that these four burgesses or inhabitants, should be all of them *Aldermen*. This bye-law is void, as being repugnant to the charter; and judgment of *ouster* shall be given against



## A TABLE of the Principal Matters.

a mayor elected in consequence of such bye-law. Page 455

### Costs.

On a decree for tithes, the Master reported only 9 s. due to the plaintiff, yet this shall entitle him to his costs. 314

### Customs.

By the custom of several manors in the counties of *Cumberland* and *Westmoreland*, a general fine becomes payable upon the death of the Lord. This is a good custom, even where the manor has been alienated by the Lord in his life-time. 204

### Custom of London.

A personal undertaking in the Court of Aldermen, to become a freeman of the City of *London*, within a certain time; is equivalent to a covenant in writing for the same purpose. And tho' this agreement was never performed, yet the man's personal estate shall, after his death, be distributed according to the custom of *London*, notwithstanding he by will had disposed of it in a different manner. 7

### Debtors and Creditors.

Creditors who recover against an executor in a Court of Equity, shall be preferred to those who afterwards obtain judgments at law. 287

### Decree.

The decree of a Court of Equity, is equal to a judgment at law; and where an executor, in obedience to a decree, pays away assets to some creditors, after which other creditors obtain judgments against him, to which

the decree is not pleadable; the Court will protect him in paying obedience to the decree. Page 287

Under what circumstances, a decree obtained upon process of contempt, may be set aside. 546

Where a bill is filed to set aside a conveyance for fraud, imposition and want of consideration, and for other relief; and the Court dismisses the bill so far as relates to the conveyance, but gives the plaintiff liberty to proceed at law as to the other matters, and in the mean time retains the bill, as to those matters; if the plaintiff neglects to proceed at law, within a reasonable time, and suffers his bill to be absolutely dismissed for such neglect, he cannot afterwards complain of the decree by way of appeal. 583

### Devise.

*A.* made his will beginning with these words, *viz.* "As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof, in manner following, that is to say; *imprimis*, I will that all my debts which I shall owe at the time of my decease, be discharged and paid." Held, that this was a good charge upon the testator's real estate, for such debts as his personal estate was not sufficient to pay. 90

*I. S.* on the marriage of his son *B.* settled lands in the usual manner, with the reversion in fee to himself. He afterwards by his will devised these lands, *on failure of issue of the body of B. and for want of heirs male of his own body, to his daughter F. and the heirs of her body.* Held, that this did not give an estate tail by implication to *B.* and that the devise to *F.* was executory and void, as being on too remote a contingency. 96

*A.*



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*A.* devised lands to his son *B.* but if he should die without issue male of his body then living, or which might be afterwards born, that then his daughter *M.* should receive at her age of 21, or day of marriage, which should first happen, 3500*l.* over and above 2500*l.* before given her; and in case the contingency of his said son's dying without issue male, should not happen before his daughter's said age, or day of marriage, that then she should receive the said 3500*l.* whenever such contingency might happen; and the testator charged this legacy or portion on his real estate. *M.* having attained 21, married, and died in the life-time of her brother *B.* who afterwards died without issue male. Held, that the husband and administrator of *M.* was entitled to this legacy, and that it was a subsisting charge on the testator's real estate. Page 228

The mortgagee for a term of years being in possession, devises the premises as an estate of inheritance to three several persons for life successively, with remainder to their first and other sons, remainders over. The remainders over are void, as tending to a perpetuity. 244

*A.* devised all his real estate to his son *B.* and his issue, remainders over; and directed the residue of his personal estate to be laid out in land, and settled to the same uses as he had devised his real estate. *B.* died without issue, before this residue was laid out. Held, that his executor was not entitled to it, but that it should be invested in the purchase of lands, pursuant to the testator's will. 263

### Dower.

By an *Irish* statute 6<sup>o</sup> *Ann.* a woman by subtil means, or secret insinuations

and delusions, threats or menaces, prevailing on the son and heir apparent of any person, having lands of the yearly value of 50*l.* or personal estate of the value of 500*l.* to marry her; is rendered incapable of demanding any dower or thirds, or other interest, out of the real or personal estate of her husband. This being in the nature of a penal statute, must be construed strictly; and therefore where it is pleaded to a writ of dower, the jury must expressly find that subtil means, &c. were used; for they are not to be presumed from the circumstance of the marriage being private, and without the father's consent. Page 362

### Error.

A writ of error in Parliament from a judgment of any of the Courts of law in *Ireland*, will not lie, unless the record first passes through the Court of King's Bench in *England*. 366

### Evidence.

A decree of the Court of Chancery determining a matter of right, is good evidence of that right, as to all persons claiming under the party, against whom the decree was made, though at the distance of 100 years afterwards. 33

And depositions of witnesses taken in former causes, relating to the same matter for which a new suit is instituted against another party, ought to be permitted to be read as evidence, upon the hearing of such new cause; although the witnesses themselves are not proved to be dead. 157

No parol evidence is admissible to controul or take away a plain and express devise. And therefore, where a man

is



## A TABLE of the Principal Matters.

is indebted to another by bond, and the obligee makes him one of his executors and residuary legatees, without saying any thing about this bond debt, it shall constitute part of the residue of his estate; and no parol evidence, however clear and strong, shall be admitted to shew the testator's intention to discharge the party from the bond. *P.* 179

In a dispute between the Lord of a manor and his tenants as to a custom, deeds between the Lords and tenants of neighbouring manors, are admissible evidence to explain and support the custom. 204

The answer of an impropriator, admitting the Vicar's right to all tithes, except corn and grain, is not sufficient evidence to establish that right against the occupiers. 216

An old decree for the payment of tithes is evidence of a Vicar's right, though no endowment can be shewn, nor any proof of payment, in pursuance of that decree. 216, 235

The depositions of witnesses are not to be suppressed, because they are made in the express terms of voluntary affidavits, sworn by them at the commencement of the suit. 397

Where a defendant cross-examines the plaintiff's witnesses, he cannot afterwards move to suppress their depositions in chief. *ibid.*

Affidavits of a defendant's illness and incapacity to put in an answer, are admissible evidence, on which to ground an application to discharge process of contempt, and receive the answer; though the suit be instituted in *Ireland*, and the affidavits sworn in *England*; and though a decree has been taken *pro confesso*, in consequence of the contempt. 546

A Court of Equity may, upon the testimony of witnesses, determine upon

the sanity or insanity of a person, without sending it to a trial at law. *P.* 557

### Executors.

Where a legacy is left to one of two executors, neither of them is thereby excluded from the surplus of the personal estate undisposed of. And tho' there have been a variety of opinions, and some different determinations, touching the residue of personal estates not expressly bequeathed by will; yet, it has never been carried so far, as to exclude two executors, by reason of a legacy given only to one of them. 1

*A.* devises the residue of his real and personal estate not before devised, to his two executors as tenants in common, and one of them is indebted to the testator on bond. This bond debt is not released or extinguished by the devise, but shall be divided between them. And no parol evidence is admissible of the testator's intention to release it to the obligor, or of his having given instructions to the attorney, who drew his will for that purpose. 179

Where a man appoints two executors, but makes no disposition of the residue of his estates, they are entitled to such residue as joint tenants. 224

### Fines.

There must be an actual entry to avoid a fine; and no ejectment can be maintained, where the demise is laid before the time of such actual entry. 353

### Fraud.

*A.* filed his bill to be relieved against a long lease granted by his ancestor, on the foot of fraud; but not giving sufficient



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sufficient evidence of the fraud, his bill was dismissed with costs. Some years after, *A.* filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside; and, on an appeal, this decree was affirmed. Page 80

*I. S.* on his coming of age was prevailed upon to join with his father in making a settlement of the father's estate; but it being afterwards discovered, that this settlement was repugnant to certain articles which the father had entered into previous to his marriage, and which were totally concealed from *I. S.* the settlement was set aside for fraud, and the articles established. 199

A father makes his son by the first wife, agree to a provision for a second wife and her children, in the son's own wrong, and who at the time of the agreement was ignorant of his right. This is a fraud upon the son, and he is not bound to a performance of the agreement. 237

Where in a treaty for an agreement one of the parties wilfully conceals a material fact, in order to keep the other party in ignorance, and to profit by that ignorance; this is a gross fraud, and will in equity set aside the contract. 497

*A.* obtains a conveyance from an insane person, long before any commission of lunacy issues, or is executed. This is a fraud, and the conveyance shall be set aside, though the consideration money was near the value of the estate. 557

### Infant.

The guardian of two infants gives each of them a legacy of 100 *l.* and

remits whatever was due to him for their maintenance. Held, that this included all demands for their education. Page 186

In what case a Court of Equity will direct an inquiry, whether it will be for the benefit of an infant heir, to perform an agreement made by his father. 435

A mortgagor brings a bill to redeem, obtains a decree for an account, &c. in the usual manner, and the account is accordingly taken by the Master. Before any further proceeding, the plaintiff dies, and his infant son and heir revives and carries on the suit. Held, that he is bound by the account already taken; but he shall be at liberty to surcharge and falsify it if he can. 447

### Injunction.

It is usual in *Ireland*, for a lessee who has been three years in possession and is disturbed, to file his bill in the Court of Chancery there, for an injunction to quiet him in possession, till evicted, by due course of law; and this usage is founded upon the equity of the statutes made against forcible entries. But all bills of this kind must alledge, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in any other person. 128

### Interest.

*A.* being indebted to *B.* in 800 *l.* on a stated account, entered into articles for the payment of this debt by instalments, of 80 *l.* per ann. *A.* afterwards by deed, created a term of years for the payment of his debts, out of the rents and profits of his estate, but not by sale fale



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sale or mortgage. Only two of these instalments being paid, a bill was brought for recovering the rest; and on a question whether they carried interest, it was held they did; and they were accordingly decreed to be paid, with interest at 4*l. per cent.* Page 164

### Joint-tenants.

*A.* by his will gives several legacies to his children, and appoints his two eldest sons joint executors; but makes no express disposition of the residue of his personal estate. Held, that this residue belongs to the executors as joint-tenants, and that one of them having died without making any severance, the whole survives to the other. 224

Where two executors are joint-tenants of the residue of a testator's personal estate, their employing part of it in trade for their mutual benefit, does not amount to a severance as to the whole. *ibid.*

### Issue.

Where on an agreement for a lease, the rent, commencement or duration of it are uncertain, or where the execution of the lease, and settling the particular terms of it, depend upon the consent of a third person; a Court of Equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed. 567

### Legacies.

*A.* by will, gives 100*l.* South-sea stock to *B.* and another 100*l.* South-sea stock to *C.* payable in six months after his death. Before the time expired, an addition was made by the Company

to every 100*l.* stock. Held, that the legatees were entitled to the additional, as well as the original stock. Page 1

### Statute of limitations.

In what case a Court of Equity will restrain a man from pleading the statute of limitations to an action at law. 328

### Mortgage.

The heir of a mortgagor files his bill to redeem an old mortgage made by demise for 999 years, under a rent of 20*s.* and redeemable at any time on paying 1200*l.* at one entire payment. The defendant pleads his title as a purchaser for a valuable consideration, under a marriage settlement, without notice of the mortgage. The settlement was made by the original mortgagee, and there was a quiet possession of 70 years. The plea was allowed. 74

Where by the express terms of a mortgage it is agreed, that if the money be not paid within a certain time, the estate shall be irredeemable; this is considered in the nature of a conditional purchase, and no redemption ought to be allowed; especially after a lapse of many years. 142

So where the mortgage money is stipulated to be paid in one entire sum, and the mortgagee and those claiming under him, continued in possession for near 100 years, without foreclosing; a bill brought to redeem, shall be dismissed with costs. 369

Where a mortgagor brings a bill to redeem, and after a decree, the account is taken by the Master; but before any thing further is done, the plaintiff dies; his infant son and heir is bound by the account, unless he can surcharge or falsify it. 447

There



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There being accounts subsisting between *A.* and *B.* a banker, *A.* gives a cash note to *C.* for 5000*l.* and *A.* mortgages his estate to *B.* as a collateral security for the money. *C.* keeps the note by him, and after the mortgage was forfeited, *B.* becomes bankrupt. *A.* brings his bill for relief against the mortgagee, because *C.* neglected to turn the note into money. Held, that *A.*'s estate was liable to pay the principal and interest due on the mortgage. Page 553

### Papia.

Where a person sues as a protestant discoverer under the Popery Acts, he becomes entitled to the rents and profits of the estate, from the time of filing his bill; and if he dies pending the suit, having made a will, those rents and profits will belong to his devisee. But such devisee cannot regularly exhibit a bill of revivor; but must exhibit an original bill, as a protestant discoverer in his own right. 348

### Pardon.

Offences against the private statutes of a college, are not pardoned by a general act of grace. 41

### Party.

A lease of lands is granted, with an exception of mines, &c. and a power of working the same, and a covenant from the lessor to make satisfaction for all damages and spoil of ground, to arise by working the mines. At the time of granting this lease, certain coal-mines upon the premises were demised to *J. R.* In a bill brought for a performance of this covenant against the representatives of the lessor, it is ne-

cessary to make the lessee of the coal-mines a party. Page 122

But when at the hearing of the cause, an objection is taken for want of parties, the Court ought not for that reason to dismiss the bill with costs; but should order the cause to stand over, with liberty for the plaintiff, on payment of costs, to amend his bill by adding proper parties. *ibid.*

### Plea.

Where a plaintiff replies to a plea, he admits it to be a good bar, if the facts therein alledged are true; and therefore cannot afterwards complain of the order made for allowing the plea, but must proceed to examine witnesses to falsify it. 74

The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds declaring the uses of such fine. 253

The defendant in a *quo warranto*, insists by his plea upon the charter of the corporation, and by his rejoinder rests his defence upon a bye-law of the same corporation. This rejoinder is no departure from the plea. 455

### Portions.

Where portions for daughters are secured by a trust term, to be raised by rents and profits, and no time is limited for the payment of them; they shall neither carry interest or be raised by sale or mortgage, but by perception of the rents and profits only. 109

### Power.

A power of revocation is reserved to *A.* by any writing under his hand and seal, and of appointing new uses, by  
*the*



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*the same or any other deed: A. by his will, without taking any notice of the power, devises the estate to B. Held, that this was a good execution of the power.* Page 523

### Process.

A bill being filed in *Ireland* against a person resident in *England*, the defendant appeared, and sued out a commission to take his answer, returnable without delay; but before the answer could be prepared, he was taken ill, and continued so for several months. In the mean time, the plaintiff proceeded in taking out the usual process of contempt, and having obtained an order, that the bill should be taken *pro confesso*, the cause was heard, and a decree made. Afterwards, the defendant moved to set aside these proceedings, and decree, and that his answer might be received; and upon payment of costs, it was ordered accordingly. 546

### Recovery.

Tenant in tail with the reversion in fee *ex parte materna*, suffers a common recovery; the old use is gone, and the lands descend to his right heir. 486

A recovery without seisin, is imperfectly found, and no *venire facias de novo* shall be awarded. 504

### Rehearing.

A decree was made *ex parte* against *A.* to pay one moiety of a sum of money said to be due from *A.* and *B.* to *C.* upon a stated account between *C.* and *B.* but to which *A.* was neither party or privy. Some years passed before *A.* knew of this decree, but on

being informed of it, he applied by petition, to have the cause reheard. This was refused, and the petition dismissed; but on an appeal, the order of dismissal was reversed, and the Lord Chancellor was directed to rehear the cause. Page 152

After a decree has been signed and inrolled, it is too late to apply for a rehearing of the cause. 444

### Remainder.

An estate was limited (after several precedent estates for life and in tail) to the use of *A.* for 99 years, if he should so long live; and from and after the death of *A.* or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs during the life of *A.* upon trust to preserve, &c. and after the end, or other sooner determination of the said term, to the use of the first and other sons of *A.* successively, in tail male. All the preceeding estates being determined, *A.* came into the possession of the lands limited to him for 99 years; and having a son who had attained 21, they levied a fine and suffered a recovery, in which the son was vouched. The son died without issue, and afterwards *A.* died, without leaving any other son. The next remainder-man made an actual entry within five years; and upon a question whether the recovery had barred his remainder, it was held that it had not; there being no freehold in the tenant against whom the recovery was had. 405

*A.* settles his estate to himself for life, remainder to *B.* his eldest son in tail male, remainder to *C.* his youngest son in like manner, remainder to his own right



## A TABLE of the Principal Matters A

right heirs, *B.* being in possession, grants leases with covenants for a perpetual renewal, and afterwards dies without issue, *C.* the remainder-man enters, and levies a fine, the uses of which are declared to himself in fee. This fine extinguishes the estate tail limited to *C.* in remainder, but lets in the reversion which he took as heir at law of *B.* and therefore binds him to a performance of *B.*'s covenants in the leases. *P.* 594

### Rents.

Where by great length of time it is become impossible to know out of what particular lands, ancient quit rents are issuable, Courts of Equity have exercised a jurisdiction; and have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents, and payment of the same for the future. 139

### Tithes.

In a suit for tithe of lambs, the defendant insists on a modus of 3*d.* for every lamb, payable on St. Mark's day, or so soon after as demanded. This modus is not void in law, but the validity of it shall be determined by a jury. 212

Where a plaintiff claims tithes in kind, and the defendant sets up a modus; if the plaintiff declines trying the modus at law, it shall be taken against him *pro confesso.* *ibid.*

In a suit by a vicar for tithes, the occupiers insist on certain exemptions, but the impropriator by his answer, admits the vicar to be entitled to all tithes, except corn and grain. On this admission the Court decreed for the vicar, without hearing the evidence

touching the exemptions; but this decree was reversed on an appeal, and the Court was ordered to hear the cause upon the pleadings and proofs. *P.* 216

An old decree for the payment of tithes, is evidence of a vicar's right, tho' no endowment can be shewn, nor any proof made of payment in pursuance of that decree. 216, 235

A Parson may sue in a Court of Equity for his tithes, be the amount of the demand ever so small. 314

### Trust and Trustees.

*C.* lends money upon the mortgage of a copyhold estate, but being infirm and unable to travel, the surrender, &c. is taken in the name of *D.* her son-in-law, who executes a declaration of trust.

*C.* afterwards purchases the equity of redemption, and the second surrender is, for the same reason, taken in the name of *D.* but no declaration of trust is made on occasion of this purchase. Held, that the heir of *D.* was a trustee of the estate for the heir of *C.* and that *D.* having expressly declared the trust as to the first surrender, there was no necessity for a new declaration of trust as to the equity of redemption. 67

*A.* purchases an estate in the name of *B.* and suffers him for many years to act as the owner of it, by receiving the rents, &c. but no declaration of trust was ever executed by *B.* After both their deaths, the heir at law of *A.* insists, that *B.* was only a trustee as to this estate for *A.* and therefore demands a conveyance, and an account of rents and profits, and files a bill for that purpose. Bill dismissed with costs. 258

Where property is deposited in the hands of three persons, and two of them go abroad out of the kingdom, the one remaining



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remaining shall be answerable for the whole value. Page 328

In what case a trustee shall not avail himself of the statute of limitations. *ibid.*

A. being in possession of lands for a long term of years, contracts for the purchase of the reversion and inheritance, but to prevent a merger of the term, takes the conveyance to B. absolutely, and without requiring any declaration of trust. The title deeds were all along in the custody of A. and those claiming under him; but a descendant of B. having by accident discovered, that the conveyance was made absolutely to him, lays claim to the estate as his heir at law. Held, that

under these circumstances, B. was a trustee for A. Page 337

## Verdict.

On the trial of an issue joined upon a *mandamus*, the jury find a special verdict as to the facts, but omit to find damages or costs. This verdict is imperfect, and therefore no judgment ought to be given upon it, but a *venire facias de novo* should be awarded. 271

A verdict certified by the judge to be entirely to his satisfaction is never suffered to be impeached, as contrary to evidence, by affidavits; and though the jury state the particular evidence on which they find the fact, yet this is only surplusage, and will not vitiate the verdict. 611

## Clips.

In a suit for title of lands, the defendant insists on a modus of 3d. for every land, payable on St. Mark's day, or to soon after as demanded.

This modus is not void in law, but the validity of it shall be determined by a jury.

Where a plaintiff claims tithes in kind, and the defendant sets up a modus, if the plaintiff declines trying the modus at law, it shall be taken against him.

In a suit by a vicar for tithes, the occupiers insist on certain exemptions, but the impropriator by his answer admits the vicar to be entitled to all tithes, except corn and grain. On this admission the Court decreed for the vicar without hearing the evidence.

## F I N I S.



REPORTS

OF THE

WINDS OF ERROR

SHIP COURT OF PARLIAMENT

FROM THE YEAR 1701, TO THE YEAR 1779



BY JOSIAH BROWN, ESQ.

BARRISTER AT LAW

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